SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2008 CF1 ????**
v.	:	**Hon. N.K.**
	:	**Status Hearing: May ???, 2009**
L.W.	:	

MOTION TO DISMISS COMPLAINT AND TRANSFER CASE TO THE FAMILY DIVISION OR IN THE ALTERNATIVE FOR REVERSE TRANSFER HEARING PURSUANT TO D.C. CODE §16-2307

L.W., through undersigned counsel and pursuant to his Fifth Amendment right to due process of law and equal protection of the law, as well as his Eighth Amendment right to be free from cruel and unusual and disproportionate punishment and his rights under international law, respectfully moves this Honorable Court to dismiss the complaint against him, and transfer the case to the Family Division. In the alternative, and without waiving that request, Mr. W. requests a reverse transfer hearing pursuant to D.C. Code §16-2307. **An evidentiary hearing on this Motion is respectfully requested.**

As grounds for this motion, undersigned counsel states the following:

1. L.W. was born on June 28, 1991, and was 17 years old at the time of the alleged offenses in this case on September 28, 2008.

2. Mr. W. is charged as an adult in the Criminal Division by complaint with, second-degree murder while armed, in violation of D.C. Code §§ 22-2013, 4502.

3. Mr. W. is charged as an adult on the basis of a unilateral decision by the Office of the United States Attorney that was made without an individualized examination of his age, the nature of the offense alleged, and the extent and nature (or lack thereof) of Mr. W.' prior delinquency record, his mental condition, his response to past treatment efforts, including any

record of abscondances, the techniques, facilities, and personnel available for rehabilitation available in the Family Division as compared with the Criminal Division, and the potential rehabilitative effect on Mr. W. of providing parenting classes or family counseling for one or more members of Mr. William's family or for his caregiver or guardian,[1] and without the opportunity to have the determination to prosecute him in the Criminal Division subject to judicial review or challenged in any way whatsoever.

MEMORANDUM OF LAW

I Introduction: Minors Charged In The District of Columbia

II. The Constitutional Challenge To The District's "Direct File" Provision Is Based On Case-Law and Information That Did Not Exist Until Recently

A. The Supreme Court's Decision In *Roper v. Simmons*

B. Recent Discoveries In Brain Science Relevant To The District's "Direct File" Provision

The Nature of Mr. W.' Constitutional Challenges

III. Prosecuting Mr. W. As an Adult Violates His Right to Equal Protection

IV. Prosecuting Mr. W. In The Criminal Division Violates His Right To Substantive and Procedural Due Process of Law

A. Recent Advances in Science Demonstrate That Any So-Called "Justifications" For Prosecuting Mr. W. As An Adult Is Not Rationally Related To A Legitimate Governmental Purpose

V. The Direct File Provision Violates The Eighth Amendment

VI. The Government's Failure To Exercise Discretion In Its Title 16 Charging

[1] *See generally* D.C. Code §16-2307(e). *See also Kent v. United States*, 383 U.S. 541, 566-567 (1966) (enumerating factors to be considered before charging a child with criminal offenses in the Criminal Division as an adult).

I. Introduction: Minors Charged In The District of Columbia

In the District of Columbia, persons under eighteen years of age may be charged as adults in the Criminal Division through two different mechanisms. Fifteen-year-olds, may be charged as adults in the Criminal Division only after a transfer hearing,[2] and only if they are charged with an enumerated felony.[3] D.C. Code §16-2307(a) (1). Legislatively, specific factors have been deemed relevant to that transfer determination. D.C. Code §16-2307(e) (1-6). Sixteen- and seventeen-year-olds, however, may be charged in the Criminal Division as adults in one of two different ways. The first is through a transfer proceeding, *see* Note 1, *supra*, that includes the right to a transfer hearing and a determination by a judicial officer that the statutorily enumerated factors demonstrate that a given child warrants prosecution as an adult. The second, as happened in Mr. W.' case, is through the "direct-filing" of a compliant or indictment by the Office of the

[2] *See* D.C. Code §16-2307(d).

[3] "There is a rebuttable presumption that children **between the ages of fifteen and eighteen** who are charged with 1) murder, first-degree sexual abuse, burglary in the first degree, armed robbery, assault with the intent to commit any of the foregoing offenses, or 2) any of the foregoing offenses and any other offense properly joinable with those offenses "should be transferred for criminal prosecution." D.C. Code §16-2307(e-2) (emphasis supplied). This provision was added in 2005 Law 15-261 "Omnibus Juvenile Justice Act of 2004" which became effective on March 17, 2005.

United States Attorney if the child is charged with 1) murder, first-degree sexual abuse, burglary in the first degree, armed robbery, assault with the intent to commit any of the foregoing offenses, or 2) any of the foregoing offenses and any other offense properly joinable with those offenses. D.C. Code §16-2301(3) (excluding from the jurisdiction of the Family Division, through definition of the term "child," persons under eighteen but sixteen or older charged with specified offenses). As observed by Judge Skelly Wright, "this so-called 'definition' in fact establishes a second, parallel waiver procedure whereby a juvenile can be transferred from the Family Division to adult court." *United States v. Bland*, 153 U.S. App. D.C.254, 265, 472 F.2d 1329, 1340 (D.C. Cir. 1972) (Wright, J., dissenting), *cert. denied*, 412 U.S. 9-09 (1973).[4] Significantly, unlike fifteen- to eighteen-year-olds subject to a transfer proceeding under D.C. Code §16-2307, there are no enumerated factors statutorily deemed relevant to the "direct file" decision, a decision that is made by the Office of the United States Attorney unilaterally and without any judicial review.

The overlap between the two provisions by which sixteen- and seventeen-year-olds may be charged in the Criminal Division, *i.e.*, through a transfer proceeding pursuant to D.C. Code §16-2307, or by way of a "direct-file" by the Office of the United States Attorney, *see* D.C. Code

[4]It was 1972 when the Court of Appeals for the District of Columbia Circuit issued its opinion in *United States v. Bland*, 153 U.S. App. D.C. 254, 472 F.2d 1329 (1972), *cert. denied*, 412 U.S. 909 (1973). In *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971), the District of Columbia Court of Appeals made clear that it was not bound by opinions rendered by the United States Court of Appeals for the District of Columbia Circuit that were rendered after February 1, 1971. Only those rendered prior to February 1, 1971 "constitute the case law of the District of Columbia." 285 A.2d at 312. Thus, because *Bland* was decided after February 1, 1971, it is not binding precedent on this Court.[4] Moreover, no opinion of the District of Columbia Court of Appeals has squarely addressed the issues presented by Mr. William's litigation, although in passing, and without any discussion, a few decisions have acknowledged the practice of the United States Attorney's Office unilaterally electing to prosecute a sixteen- or seventeen year-old as an adult Significantly, even if this Court finds *Bland* to have some persuasive value, it dealt only with the procedural due process and equal protection challenges to D.C. Code §16-2301, but did not discuss the substantive due process issues, the Eighth Amendment issue, the international law claims, nor the abuse of discretion arguments that Mr. W. has raised.

§16-2301(3), in and of itself is an implicit recognition 1) that it is appropriate to have an individualized judicial determination of whether prosecution of a specific minor in the Criminal Division is warranted, and 2) that specifically relevant and legislatively delineated factors, should be considered in making that determination. Moreover, D.C. Code § 16-2301 was designed for "**certain** individuals between the ages of 16 and 18" but not for all of them. *Bland*, 472 F.2d at 1332, 153 U.S. App. D.C. at 257 (emphasis supplied).

Today the District of Columbia is one of fifteen jurisdictions with "direct-file" provisions that leave entirely in the prosecutor's hands the decision whether to charge a sixteen- or seventeen-year-old as an adult. *See* Patrick Griffin, *Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws*, Table 1, Page 3 www.ncjj.org (2003). Of those fifteen jurisdictions, eleven have statutory provisions by which, even if a prosecutor seeks to have a minor transferred for prosecution as an adult, the minor can challenge that determination through a motion for "reverse" transfer or "reverse waiver" thereby occasioning a judicial review of the propriety of the transfer.[5] *Id.*

Significantly, it appears that in the District of Columbia the USAO charges as adults **every** sixteen to eighteen year old who is alleged to have committed one of the offenses enumerated in §16-2301(3), and not just "certain" youth.[6] This is inconsistent with the legislative intent behind §16-2301(3). *See Bland* 472 F.2d at 1332, 153 U.S. App. D.C. at 257 n. 11 ("'[T]he [Senate] Committee [on the District of Columbia] did **not** take so dim a view of

[5]The eleven states that have "reverse waiver" provisions are Arizona, Arkansas, California, Colorado, Georgia, Montana, Nebraska, Oklahoma, Vermont, Virginia, and Wyoming.

[6]Based upon pleadings and independent investigation conducted in the case of *United States v. Alishia Carrington*, Criminal Case No. 2006 CF1 17652, pending before the Honorable Wendell Gardner, in which this challenge also was raised and litigated, undersigned counsel has been able to establish that the government does not exercise discretion in determining which youth to charge as adults.

juveniles in the 16- to 18-year-old age group generally as to presume sophistication in **every** case involving serious misconduct- and especially in cases involving first offenders or where any previous offense was committed before the onset of a relatively significant degree of discretion'") (emphasis supplied).

Beyond being inconsistent with the statute's legislative history, the wholesale prosecution in the Criminal Division of those 16- to 18-year olds charged with the enumerated offenses is an abrogation of the prosecutorial duty to exercise discretion because the failure to exercise discretion itself is an abuse of discretion.[7] *See State v. W.S.*, 700 P.2d 1192, 1195 (Wash. App. 1985) (the preclusion from diversion of "an entire class of offenders regardless of the individual characteristics of the offender or his behavior . . is arbitrary.") Prosecutorial discretion "necessarily assumes that the prosecutor will exercise it after an analysis of all available relevant information . . . [A] fixed formula which requires a particular action in every case based upon the happening of a specific series of events constitutes an abuse of discretionary power lodged in the prosecuting attorney." *State v. Pettitt*, 609 P.2d 1364, 1367-1368 (Wash. 1980) (*en banc*). *See*

[7]In *United States v. Alishia Carrington*, 2006 CF1 17652, on December 15, 2006, the Honorable Wendell Gardner, in the context of a similar challenge (to Ms. Carrington's prosecution as an adult for a homicide), acknowledged that the government's failure to exercise discretion in which 16- and 17-year-olds it elects to charge in the Criminal Division, and to charge all eligible youth as adult, could itself constitute an abuse of discretion, and further recognized that the defense has no way to know how the government makes its charging decisions nor with respect to how many youth the USAO has foregone prosecution in the Criminal Division and allowed them to be prosecuted in the Family Division. Accordingly, Judge Gardner ordered that by January 5, 2007, the Office of the United States Attorney was to provide data regarding how many 16- and 17-years olds who had been arrested for murder (as opposed to manslaughter) it had **declined** to prosecute as adults **since the inception** of D.C. Code §16-2301. Judge Gardner further ordered that by January 5, 2007, the government disclose the criteria by which it determines which 16- and 17-year-olds to prosecute as adults in the Criminal Division. On January 8, 2007, the government filed a response to Judge Gardner's order, in which it refused to disclose the criteria used to make its decisions about which youth to prosecute as adults, and provided data (only for the years 1999-2005) suggesting that it had prosecuted 45 of 49 (or 92%) 16- and 17-year olds in the Criminal Division for murder. **Mr. W. requests that this Court order the government to provide discovery relevant to the challenge to the government's wholesale prosecution of every Title-16-eligible youth in the Criminal Division.**

also State v. Mohi, 901 P.2d 991, 1002-1003 (Utah 1995) (regarding the evils of "unguided" prosecutorial discretion and the absence of a "rational connection between the legislature's objective of balancing the need of children with public protection" and the prosecutors' "total discretion in deciding which members of a potential class of juvenile offenders to single out for adult treatment").

In Mr. W.' case it is clear that no individualized determination was undertaken with respect to Mr. W. and his background, but that instead a "formula" based upon the alleged criminal offense he committed caused the USAO to charge him as an adult. *Pettit*, 609 P.2d at 1368 ("By its very nature the exercise of discretion cannot be reduced to a formula."), *citing* AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE PROSECUTION FUNCTION.[8] Moreover, undersigned counsel submit that the USAO lacks the internal guidelines by which to determine which youth to charge as adults. Seemingly that accounts for the USAO's charging in the Criminal Division all sixteen- and seventeen-year-olds eligible for prosecution as adults contrary to the admonition of the American Bar Association that guidelines be developed for the exercise of discretion. *Id.* ("By its very nature . . . the exercise of discretion cannot be reduced to a formula. Nevertheless guidelines for the exercise of discretion should be established") *citing* American Bar Association, Standards for Criminal Justice, Prosecution Function Standards, Standard 3-2.5.

[8] *Pettitt* cites the 1971 American Bar Association Standards relating to the prosecution function. In relevant part the most recent edition of those standards, in 1993, states that a prosecutor may decline to file charges based, *inter alia*, upon "the disproportion of the authorized punishment in relation to the particular offense **or offender**" and also upon the "availability and likelihood of prosecution by another jurisdiction." American Bar Association, Standards for Criminal Justice, Prosecution Function Standards, Standard 3-3.9 Discretion in the Charging Decision, §§ iii, vii. Clearly in this case, given Mr. W.' background, and given the availability of prosecution in the Family Division, the USAO failed to exercise individualized discretion in charging Mr. W. as an adult, because if the USAO did not prosecute him, he would be charged in the Family Division, but could avoid the prospect of an adult criminal conviction that could significantly undermine his post-secondary educational prospects.

In contrast to a prosecution in the Criminal Division as an adult, the very philosophy underlying the District's juvenile system is the doctrine of *parens patriae*. *See e.g.*, D.C. Code §16-2301(6) ("the term 'delinquent child means a child who has committed a delinquent act and is **in need of care and rehabilitation**") (emphasis supplied). *See also United States v. Tucker*, 407 A.2d 1067, 1071 (D.C. 1979) (acknowledging "the rehabilitative purposes of our juvenile justice system"); D.C. Code §16-2305 (d) (stating that a petition shall allege, *inter alia*, that "the child appears to be in need of care and rehabilitation").

The statute and rules governing juvenile proceedings are clear in recognizing the right to care and rehabilitation to be afforded minors charged with criminal offenses. For example, D.C. Code §16-2305.01 acknowledges that the juvenile system is less punitive in nature than the adult system by stating explicitly that, with respect to children arrested for certain non-violent offenses, the District of Columbia's policy is that, if they have had little or no contact with the juvenile justice system and if they do not represent a danger to the public safety, they may "benefit from an alternative to adjudication that is noncriminal, reformative, and protective in nature." *See also* D.C. Code §16-2318 (deeming an order of adjudication non-criminal). Implicit in this recognition is that through adjudication, the juvenile system, as opposed to the adult system, is able to handle children charged with violent offenses, such as those for which sixteen- and seventeen-year-olds may be charged as adults by the United States Attorney's Office. This follows because if juveniles charged with non-violent offenses may be afforded non-adjudicative alternatives, the implicit corollary to that notion is that those charged with violent offenses, while precluded from non-adjudicative options, are nonetheless subject to "adjudication," a term that necessarily means the child has been prosecuted in the Family Division rather than the Criminal Division. *See also In re C.S.*, 384 A.2d 407, 411 n. 11 (D.C.

1977) ("The United States Attorney has discretion under §16-2301(3)(A) not to bring criminal charges against a 16- or 17-year-old youth, leaving it to the District government to proceed in the Family Division").

The rehabilitative nature of the juvenile system is also apparent from the clear statutory mandate that any disposition entered for a juvenile be controlled by the principle that it be "in the best interest of the child." D.C. Code §16-2320(c). Similarly, Superior Court Juvenile Rule 2 explicitly states that the juvenile system in the District "embrace[s] the principle that each child is an individual entitled, in his own right, to appropriate elements of due process of law" and further adopt[s] the principle that, when a child is removed from his own home, the [Family] Division will secure for him custody, **care** and discipline as nearly as possible equivalent to that which **should** have been provided for him by his parents." Sup. Ct. Juv. R. 2 (emphasis supplied).

In short, the statutes and the rules governing the District's juvenile system make clear that it is premised upon the "theory . . of social welfare philosophy rather than in the *corpus juris*." *Kent v. United States*, *supra*, 383 U.S. 541, 554 (1966). As the Supreme Court recognized in *Kent*, in the District, "[t]he objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt, and punishment. The state is *parens patriae* rather than prosecuting attorney and judge." 383 U.S. at 554-555. *United States v. Bland*, 153 U.S. App. D.C. at 273-274, 472 F.2d at 1348-1349 (Wright, J., dissenting) ("It trivializes the juvenile court system to suggest that it represents merely an alternative forum for the trial of criminal offenses. The Family Court is more than just another judicial body; it is another system of justice with different procedures, a different penalty

structure, and a different philosophy of rehabilitation."), *citing*, *McKeiver v. Pennsylvania*, 403 U.S. 528, 550-551 (1971), *Kent v. United States*, 383 U.S. at 557.

II. The Constitutional Challenge To The District's "Direct File" Provision Is Based On Case-Law and Information That Did Not Exist Until Recently

It has been more than three decades since any significant constitutional challenge to the District's statutory scheme for prosecuting minors as adults in the Criminal Division has been brought. Over thirty years ago, in *United States v. Bland*, *supra*, the United States Court of Appeals for the District of Columbia Circuit examined the "direct file" provision of the District of Columbia Code and held that the direct file provisions of the code did not run afoul of the constitutional protection of procedural due process, or equal protection of the law. 153 U.S. App. D.C. at 258-262, 472 F.2d at 1333-1337.[9] *See also Pendergrast v. United States*, 332 A.2d 919, 922-924 (D.C. 1975) (stating, without discussing, that D.C. Code §16-2301(3) survived a constitutional challenge in *Bland*). *But see Bland*, 153 U.S. App. D.C. at 268, 472 F.2d at 1343 (Wright, J., dissenting) ("The transfer of the waiver decision from the neutral judge to the partisan prosecutor increases rather than diminishes the need for due process protection of the child"). In *Bland* the D.C. Circuit further held that the statute did not violate the constitutional presumption of innocence. 153 U.S. App. D.C. at 262-264, 472 F.2d at 1337-1339.

[9]It was 1972 when the Court of Appeals for the District of Columbia Circuit issued its opinion in *United States v. Bland*, 153 U.S. App. D.C. 254, 472 F.2d 1329 (1972), *cert. denied*, 412 U.S. 909 (1973). In *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971), the District of Columbia Court of Appeals made clear that opinions rendered by the United States Court of Appeals for the District of Columbia Circuit that were rendered after February 1, 1971, were not binding in the local courts. Only those rendered prior to February 1, 1971 "constitute the case law of the District of Columbia." 285 A.2d at 312. Thus, because *Bland* was decided after February 1, 1971, it is not binding precedent on this Court. Moreover, even if this Court finds *Bland* to have some persuasive value, it dealt only with the procedural due process and equal protection challenges to D.C. Code §16-2301, but did not discuss the substantive due process issues, the Eighth Amendment issue, the international law claims, nor the abuse of discretion arguments that Mr. W. has raised.

Significantly, in *Bland*, no challenge was made to the "direct file" provisions of the District of Columbia Code as violative of the guarantee of substantive due process or of the Eighth Amendment's prohibition on disproportionate sentences. Likewise, in *Bland* no challenge was made under principles of international law as are raised herein.

In the intervening three decades since *Bland* was decided, and especially in the last five to ten years, a tremendous amount has been uncovered about adolescent behavior and brain development that was unknown in the early 1970's and that is decidedly relevant to Mr. W.' challenge. In the thirty years since *Bland* was decided, and in a number of decisions, the Supreme Court has recognized that juveniles are more than simply "little adults." *See e.g. Thompson v. Oklahoma*, 487 U.S. 815 (1988), *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Most recently, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court explained that ". . . our society views juveniles, . . ., as categorically less culpable than the average criminal." *Roper*, 543 U.S. at 567, *citing Atkins v. Virginia*, 536 U.S. 304, 316 (2002). *See also Roper,* 543 U.S. at 572 ("The differences between juvenile and adult offenders are too marked and well understood . . .").[11] The rationale and the scientific bases upon which the Supreme Court grounded its decision

---

[11]*See* Barry C. Feld, "*Competence, Culpability and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*," 32 HOFSTRA L. REV. 463, 544 (2003) (citations omitted), *citing Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988):

> Adolescents as a class characteristically make poorer choices than do adults because of normal physical, neurobiological, psychological, and developmental processes. As the Supreme Court repeatedly has recognized, 'youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.'

See also Roper v. Simmons, 543 U.S. at 572 (acknowledging that juveniles, do not engage in the same sort of "'cost-benefit analysis'" as adults do), *citing Thompson v. Oklahoma*, 487 U.S. at 837.

in *Roper* are directly relevant to the instant challenge to the District's "direct file" statute and are also profoundly germane to the propriety of charging Mr. W. as an adult in the Criminal Division.[12] Scientific advances in the last thirty years demonstrate that the wholesale prosecution of minors, and in this case of seventeen-year-old L.W., as an adult, is not rationally related to any governmental purpose. *See e.g. Effect of Violence of Laws and Policies Facilitating the Transfer of Juveniles From The Juvenile Justice System To The Adult Justice System : A Systematic Review,* AM. J. PREV. MED 2007: 32 S 15 ("On the basis of strong evidence that juveniles transferred to the adult justice system have greater rates of subsequent violence than juveniles retained in the juvenile justice system, the Task Force on Community Preventive Services concludes that strengthened transfer policies are harmful to those juveniles who experience transfer. Transferring juveniles to the adult justice system is counterproductive as a strategy for deterring subsequent violence.") (April 2007) (available at **www.ajpm-online.net**). *See also New York Times*, "Juvenile Injustice" (May 11, 2007), Page A-22 (The United States made a disastrous miscalculation when it started automatically trying youthful offenders as adults instead of handling them through the juvenile courts. Prosecutors argued that the policy would get violent predators off the streets and deter further crime. But a new federally backed study shows that juveniles who do time as adults later commit more violent crime than those who are handled through the juvenile courts.")

Indeed, in November 2008, the National Center for Juvenile Justice published a report in which it recognized the findings of a recent bulletin form the Office of Juvenile Justice and Delinquency Prevention (OJJDP), a part of the United States Department of Justice:

---

[12]At the transfer hearing that is requested as an alternative remedy to dismissal, Mr. W. would adduce evidence, including expert testimony, that would inform an individualized judicial determination regarding whether he should be prosecuted as an adult.

> With respect to the general deterrence effects of . . .[transfer] laws -- their effectiveness in reducing crime in the general juvenile population, by discouraging the commission of offenses subject to transfer and criminal prosecution -- the research has not produced entirely consistent results. Most studies have failed to uncover any reductions in juvenile crime rates that can be linked to laws subjecting youth to criminal prosecution.
>
> *****
>
> On the other hand, research comparing youth who were prosecuted as adults with similar youth handled in the juvenile system leaves little doubt regarding the specific counter-deterrent effects of transfer laws -- that is, their tendency to increase subsequent offending, especially violent offending, on the part of transferred youth.

Patrick Griffin, *Different from Adults: An Updated Analysis of Juvenile Transfer and Blended Sentencing Laws, With Recommendations for Reform*, National Center For Juvenile Justice (November 2008) at 8, *citing* Redding, R. (August 2008) *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* OJJDP Juvenile Justice Bulletin. Washington, D.C. U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. Thus it is clear, that **by prosecuting Mr. W. as an adult in the Criminal Division, the government, a part of the Department of Justice that recently has recognized the fallacious reasoning of such an approach, is actually increasing the likelihood that this youngster, with no prior criminal record as an adult or as a juvenile, will commit additional violent offenses.**

In addition to the profound recent scientific advances relevant to Mr. W.' challenge, interpretation of constitutional law is not frozen for all time. The Constitution long has been recognized to be a document that is not static and the meaning of which evolves over time. *See e.g,. A.H. Steinberg M.D., v. Paul Brown,* 321 F.Supp. 741, 750 (D.C. Ohio 1970) (""Constitutional concepts are not static"); *R.C. Tway Coal Co., et al., v. Glenn et. al Clark*, 12 F. Supp. 570, 588 (D.C. Ky. 1935) ("the Constitution is a live and vital instrument and is not

static"). *See also Marsh v. Chambers*, 463 U.S. 783, 816-817 (1983) (Brennan, J., with whom Marshall, J. joined dissenting) (". . . the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers"), and *citing Frontiero v. Richardson*, 411 U.S. 677 (1973) (gender discrimination); *Brown v. Board of Education*, 347 U.S. 483 (1954) (racial discrimination); *Colgrove v. Battin*, 413 U.S. 149 (1973) (jury trial); *Trop v. Dulles*, 356 U.S. 86 (1958) (cruel and unusual punishment); *Katz v. United States*, 389 U.S. 347 (1967) (search and seizure).

Beyond the significance of its holding and the bases for its decision, the Supreme Court's decision in *Roper* is noteworthy for its approach: it reconsidered, based on new information and an evolving national consensus, whether capital punishment for juveniles was unconstitutional. *See generally Roper*, 543 U.S. at 564-568. *See also Roper v. Simmons*, 543 U.S. at 587 (Stevens, J., concurring) (recognizing that constitutional interpretation evolves and is not "frozen"). In reconsidering the constitutionality of capital punishment for juveniles, the Supreme Court also recounted the change in the law from *Penry v. Lynaugh*, 492 U.S. 302 (1989) (upholding the death penalty for the mentally retarded) to *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding unconstitutional imposition of the death penalty on the mentally retarded). *See also Roper*, 543 U.S. at 564 ("Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford* [*v. Kentucky*, 492 U.S. 361 (1989)]"). Following the Supreme Court's lead, based upon recently uncovered scientific findings regarding adolescent brain development, this Court should adopt the same approach that the Supreme Court did in *Roper*, by reconsidering the issues decided in *Bland* and also should consider issues not raised in *Bland* that render unconstitutional the District's "direct-file" provisions.

A. The Supreme Court's Decision In *Roper v. Simmons*

In *Roper* the Supreme Court discussed three features that distinguish minors from persons over the age of eighteen and that are extremely relevant to the challenge to the District's "direct file" provisions:[13]

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies . . . tend to confirm, . . . [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. . . . *Johnson[v. Texas, 509 U.S. 350,]*367 [(1993)]; *see also Eddings [v. Oklahoma, 455 U.S. 104]*, 115-116 [(1982)] ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REVIEW 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings*, *supra*, at 115 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. *See* Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) (hereinafter Steinberg & Scott) ("[A]s legal minors, lack the freedom that adults have to extricate themselves from a criminogenic setting").
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. *See generally* E. Erikson, IDENTITY: YOUTH AND CRISIS (1968).

---

[13]Although *Roper* was decided in the context of the constitutionality of the death penalty for juvenile offenders, its rationale is no less applicable outside the context of capital punishment. *See generally* Lisa McNaughton, *Extending Roper's Reasoning To Minnesota's Juvenile Justice System*, 32 WM. MITCHELL L. REV. 1063, 1067-1068 ("*Roper*'s rationale should be applied to any situation in which juveniles are subjected to harsh punishments that are disproportionate to the juveniles' level of culpability.") (2006); Timothy Cone, "*Developing The Eighth Amendment for Those 'Least Deserving' Of Punishment: Statutory Mandatory Minimums for Non-Capital Offenses Can be 'Cruel and Unusual' When Imposed on Mentally Retarded Offenders*," 34 N.M.L. REV. 35, 37-41 (2004).

> These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "**their irresponsible conduct is not as morally reprehensible as that of an adult**". *Thompson [v. Oklahoma, 487 U.S. 815,]* 835 [(1988)] (plurality opinion). **Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment**. *See Stanford [v. Kentucky 492 U.S. 361]*, 395 [(1989)] (Brennan, J., dissenting).

Roper, supra, 543 U.S. at 569-570 (emphasis supplied). If, as the Supreme Court stated in *Roper*, "juvenile offenders cannot be classified among the worst offenders," 543 U.S. at 570, necessarily the District's "direct-file" provisions, that fail to provide for an **individualized** determination of whether a given 16- or 17-year-old should be charged as an adult in the Criminal Division, cannot withstand constitutional scrutiny. As two commentators have observed, "[i]f the child's brain is still growing until either twenty or twenty-five . . ,subjecting a child to adult punishment, . . is irrational. We do not know who that child will be in five years or ten years. Just as teenagers' bodies change as they mature, so do their brains. In effect, waiver constitutes a prediction that the child is not really as child and cannot be helped within the juvenile court system. This prediction, however, is based on many factors that may well be different within a few years." Ellen Marcus and Irene Marker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1180 (2005).

In both *Atkins* and *Roper* the Supreme Court relied upon scientific bodies of knowledge. *See e.g. Atkins,* 536 U.S. at 318, *Roper,* 543 U.S. at 568-569 (referencing "scientific studies"). If scientific advances in understanding the human brain and development were good enough for the Supreme Court to use in reaching its constitutional decisions, they should be good enough for this Court in deciding Mr. W.' challenge to the District's "direct file" provision.

B. Recent Discoveries In Brain Science Relevant To The District's "Direct File" Provision

It is now well established that different regions of the brain control different human functions. Moreover, each region of the brain matures at a different rate, and full brain development is not complete until early adulthood. Recent modern wisdom regarding brain development, now well-accepted, reveals that the brain is not fully developed until the mid-twenties.[14] Until that time, the human brain is undergoing a process known as myelination that involves the coating of the neural fibers in the brain, (called "axons") with a white fatty

---

[14]The pre-frontal cortex of the brain, responsible for "executive" functions of planning and abstract thinking, is not fully developed until one's early to mid-twenties. Francine M. Benes, *The Development of Prefrontal Cortex: The Maturation of Neurotransmitter Systems and Their Interactions*, in HANDBOOK OF COGNITIVE NEUROSCIENCE 79, 79-89 (Charles A. Nelson & Monica Luciana eds., 2001) (concluding that the development of the prefrontal cortex "includes the early adult period and possibly even beyond") *See also* "*Brain Immaturity Could Explain Teen Crash Rate*," THE WASHINGTON POST, p. A-1 (February 1, 2005) (explaining that "an international effort led by [the] NIH's Institute of Mental Health and UCLA's Laboratory of Neuro-Imaging" has demonstrated that "the point of intellectual maturity, the 'age of reason'" does not occur until age 25; and quoting Jay Giedd, pediatric psychiatrist at the National Institute of Health as saying that "'[t]eenagers' brains are not broken; they're just still under construction"); Gur, Ruben C., "*Brain Maturation and the Execution of Juveniles: Some reflections on science and the law*," THE PENNSYLVANIA GAZETTE (January/February 2005) at 14 ("some brain regions do not reach maturity in humans until adulthood . . [as has] . .been confirmed by more recent neuroimaging studies"); Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 238-39 (2003) (summarizing recent research reporting that "functions and regions of the brain regulating long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward... continue to mature over the course of adolescence, and **perhaps beyond age twenty and well into young adulthood**"); Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 60, 69 (2001) ("Regions in the PFC [prefrontal cortex] that underpin higher cognitive-executive functions mature slowly, showing functional changes that continue well into late adolescence/adulthood."). *See also* Richard Restak, M.D., THE SECRET LIFE OF THE BRAIN at 76 (The Dana Press and The John Henry Press, 2001) ("the prefrontal lobes **aren't fully mature until the 20's or even later**"); Feld, *supra* Note 11, 32 HOFSTRA L. REV. at 515 (citations omitted) ("[ne]urobiological evidence suggests **that the human brain does not achieve physiological maturity until the early twenties** and that adolescents simply do not have the same physiologic capability as adults to make mature decisions or to control impulsive behavior"); Lucy C. Ferguson, "*The Implications of Developmental Cognitive Research On 'Evolving Standards of Decency' and the Imposition of the Death Penalty on Juveniles*," 54 AM.U. L. REV. 441,442 ("Since 2000, numerous brain-scan studies have established that the human brain does not fully mature until an individual is in his or her early to mid-twenties.") (2004)

substance (called "myelin") that facilitates communication between various parts of the brain.[15] Also until late adolescence, the brain is undergoing "pruning" which involves a reduction in the amount of gray matter in the brain that permits the reasoning areas of the brain, *i.e.*, the frontal lobe, to develop and function fully.[16] Thus until myelination and pruning is complete, rather than using the prefrontal cortex (responsible for impulse control, risk assessment, and moral reasoning) to control behavior, adolescents use the amygdala, which is known for emotional impulsivity.[17] *See Inside the Adolescent Brain* (available at www.time.com (May 10, 2003 "The Secrets of the Teen Brain"). In the adolescent brain that is still undergoing myelination and pruning, the prefrontal cortex that is responsible for executive functions such as abstract thinking and rational thought is not developed.[18] Instead of relying on the pre-frontal cortex that is not fully developed, most adolescent decision-making is controlled by the amygdala. *See Inside the*

---

[15] *See Roper v. Simmons* Brief of *Amicus Curiae*, American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child and Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National mental Health Association (July 19, 2004) at 11-23. (available at http://www.abanet.org/crimjust/juvjus/simmons/ama.pdf.)

[16] *Id.*

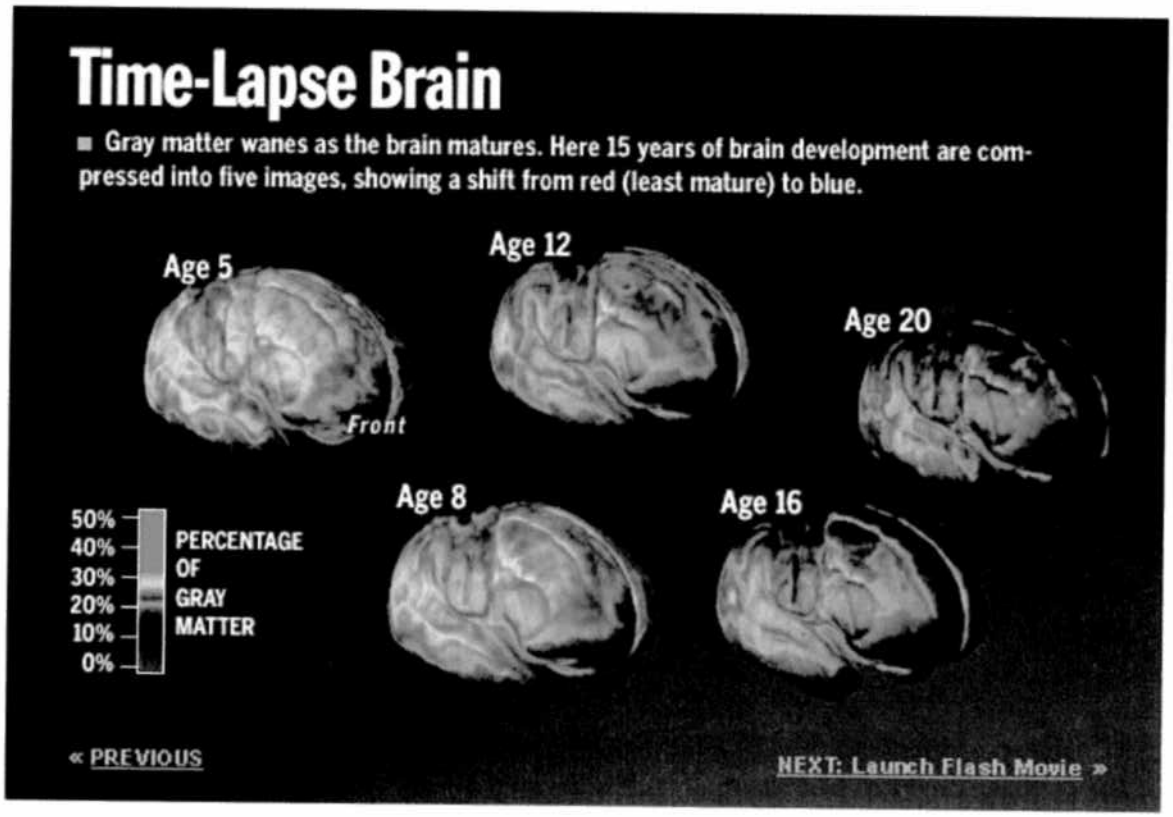
[17] *Id.*

[18] Elizabeth S. Scott & Laurence Steinberg, "*Blaming Youth*," 81 TEX. L. REV. 799, 816 (2003) ("[R]egions of the brain implicated in processes of long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward continue to mature over the course of adolescence, and perhaps well into young adulthood. At puberty, changes in the limbic system--a part of the brain that is central in the processing and regulation of emotion--may stimulate adolescents to seek higher levels of novelty and to take more risks; these changes also may contribute to increased emotionality and vulnerability to stress. At the same time, patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving planning and decision-making, suggest that these higher-order cognitive capacities may be immature well into middle adolescence. ") "While incomplete frontal lobe development in normal adolescents is likely not as extreme as in those with frontal lobe dysfunction or mental retardation, a comparison of cognitive and behavioral studies among these groups provides a better understanding of how juveniles' immature brains can lead to a similar pattern of behavior." Lucy C. Ferguson, "*The Implications of Developmental Cognitive Research On 'Evolving Standards of Decency' and the Imposition of the Death Penalty on Juveniles*," *supra* Note 14, 54 AM.U. L. REV. at 461 (emphasis supplied).

Adolescent Brain. The amygdala controls emotions and fear responses. Because the amygdala is paramount in the brain of someone under twenty-years of age, like Mr. W., and the pre-frontal cortex is not yet fully developed, the adolescent's ability to engage in rational thought, and to control his behavior engendered by emotional responses is biologically predetermined to be significantly different, and decidedly less, than that of an adult.

> [R]esearch shows that the pre-frontal cortex -- responsible for organization, decision-making, rational thought and other executive functions -- is the last part of the brain to mature. Instead of using the pre-frontal cortex to make decisions, research indicates that adolescents rely more heavily on the amygdala, the emotional center of the brain. Consequently, adolescents typically exhibit poorer risk assessment than adults and behave in a more impulsive manner.

Ferguson, *supra* Note 1, 54 AM. U. L. REV. at 456 (citations omitted). *See also*, 54 AM U. L. REV. at 458 ("adolescents tend to have greater susceptibility to peer influence when making decisions and conducting cost-benefit analyses, lack realistic risk assessment abilities, and are not as future oriented as adults") (citations omitted).



http://img.timeinc.net/time/covers/1101040510/neurons/images/graphic3.jpg (May 10, 2003)

Because available scientific information, in the form of "[f]unctional magnetic resonance imaging[,] reveals that teenagers rely more heavily than adults on the amygdala and less heavily on the prefrontal cortex when responding to stressful stimuli . ., adolescent reactions to fear-evoking stimuli appear to be more instinctual responses rather than the product of cognitive processes." Feld, *supra* Note 10, 32 HOFSTRA L. REV. at 519-521 (citation omitted). In significant part this explains why juveniles become involved in criminal behavior:

> **Many adolescents' decisions about risky behavior appear to be more a function of "gut reactions" than of conscious thought processes.** Just **as organic features produce the developmental characteristics of mentally retarded defendants**, similarly, the behaviors of adolescents may have a significant neurobiological component.

Id. (citation omitted) (emphasis supplied). *See also* www.waldorflibrary.org/Articles, THE HARVARD UNIVERSITY GAZETTE, "*Deciphering The Adolescent Brain*" (stating that research has

shown that teenage brains rely "more on the amygdala, a structure in the temporal lobes known to be involved in discriminating fear and other emotions"); "*Adolescence, Brain Development and Legal Culpability*," American Bar Association (January 2004) (discussing findings of brain development research at Harvard Medical School that revealed that, based upon their incomplete brain development, "'teenagers . . respond more strongly with gut response than they do with evaluating the consequences of what they're doing'").

> From a clinical and social policy perspective, there is increasing recognition of the importance of emotions in decision making, relevant to a wide range of risk-taking behaviors. In many ways, this perspective increasingly blurs the traditional boundaries of cognitive vs. emotional processes. This is important because the "decision" to engage in a specific behavior that has long-term health consequences . . . cannot be completely understood within the framework of "cold" cognitive processes. Cold cognition refers to thinking under conditions of low emotion and/or arousal, whereas hot cognition refers to thinking under conditions of strong feelings or high arousal. The cognitive processes involved in hot cognition may, in fact, be much more important for understanding why people[--especially youths--] make risky choices in real-life situations. While adolescents' cognitive abilities to think and to reason may be comparable to adults', youths' interpersonal context, emotional responsivity, and inexperience affect the quality of their choices and behavior.
>
> While psycho-social development proceeds through a series of stages, decision-making competencies emerge unevenly rather than as a uniform increase in overall capacity, and young people use different reasoning processes in different task domains. Differences in language ability, knowledge, experience, and culture affect the ages at which youths' various competencies emerge.

Feld, *supra* Note10, 32 HOFSTRA L. REV. at 504-505 (citations omitted).

Dr. Ruben Gur, a professor of psychiatry in the Department of Psychiatry at the University of Pennsylvania and director of the Brain Behavior Laboratory in the School of Medicine at the University of Pennsylvania, has explained:

> . . .The cortical regions that are the last to mature, particularly those in prefrontal areas, are involved in behavioral facets germane to many aspects of criminal culpability. Perhaps most relevant is the

> involvement of these brain regions in the control of aggression and other impulses, the process of planning for long-range goals, organization of sequential behavior, the process of abstraction and mental flexibility, and aspects of memory including 'working memory.' If the neural substrates of these behaviors have not reached maturity before adulthood, it is unreasonable to expect the behaviors themselves to reflect mature thought processes.
>
> *****
>
> . . [S]ince brain development in the relevant areas goes in phases that vary in rate and is usually not complete before the early to mid-20's, there is no way to state with any scientific reliability that an individual 17-year-old has a fully matured brain (and should be eligible for the most severe punishment), no matter how many otherwise accurate tests and measures might be applied to him . . .

Gur, Ruben C., "*Brain Maturation and the Execution of Juveniles: Some reflections on science and the law*," THE PENNSYLVANIA GAZETTE (January/February 2005) at 15. *See also* Declaration of Professor Ruben Gur, Professor of Psychiatry, University of Pennsylvania School of Medicine (appended hereto as Exhibit G).

In short, science now demonstrates that there is no rational basis for sixteen- and seventeen-year-olds to be charged as adults in the Criminal Division, and certainly not without an individualized judicial determination based on the facts and circumstances of each child's case that prosecution in the Criminal Division is appropriate. Car rental companies, that refuse to rent cars to persons under twenty-five years of age, and car insurance companies that have higher premiums for younger drivers, acknowledge the physiological differences in the brain of those who are sixteen-years of age, and older. *See* Exhibit A (All State Insurance 2007 "Why Do Most 16-year Olds Drive Like They're *Missing a Part of Their Brain*?") (appended hereto). Indeed a study released in August 2008 by the Department of Justice has demonstrated that recidivism actually increases when juveniles are prosecuted and sentenced as if they are adults. *See* United States Department of Justice, Office of Justice Programs, "*Juvenile Transfer Laws:*

An Effective Deterrent to Delinquency?" (August 2008) available at **http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf**. As the Supreme Court acknowledged in *Roper*, the ramifications of these recent scientific discoveries to the prosecution and sentencing of youth as adults is profound.

In the District of Columbia the legislature implicitly has recognized the inherent impulsivity of juveniles, their inability to consider fully the consequences of their actions, and the limitations in their judgment by precluding persons under eighteen from gambling,[19] playing the lottery,[20] serving on a jury,[21] entering into a contract,[22] or marrying (absent parental consent).[23] *See also* D.C. Code §25-1002(a) (prohibiting the purchase, possession or drinking of alcohol by anyone under the age of twenty-one). These examples further support the argument that there is no rational basis for fifteen-year-olds to be given transfer hearings, while permitting the USAO to unilaterally deny them to sixteen- and seventeen-year-olds by charging them as adults without any judicial review.

THE NATURE OF MR. W'S' CONSTITUTIONAL CHALLENGES

The "direct file" provision of the District of Columbia Code violates Mr. W's' constitutional right to substantive and procedural due process, equal protection of the laws, and the Eighth Amendment guarantee of proportional punishment. It is unconstitutional because it

---

[19] *See* D.C. Code §3-1334

[20] *See* D.C. Code §3-1335

[21] *See* D.C. Code §11-1906(b)(1)(C)

[22] *See* D.C. Code §28:1-103

[23] *See* D.C. Code §46-411

allows a sixteen- or seventeen-year-old to be charged as an adult, and subjected to mandatory minimum sentences, such as the thirty-year mandatory minimum for first-degree murder, without an individualized determination regarding the specific youth and the factors that statutorily have been deemed relevant in the context of a transfer proceeding. D.C. Code §16-2307(e) (1-6). *See also Kent v. United States*, 383 U.S. at 566-567 (setting forth "criteria and principles governing waiver of jurisdiction which are consistent with the basic aims and purpose of the Juvenile Court Act"). While "the state has a right to punish those who violate the criminal law, particularly murderers, even if they would not commit crimes in the future[, and r]etribution has a place in the justification of punishment[, r]etribution principles do not . . tell us with any specificity how much punishment is necessary for atonement." Ellen Marcus and Irene Marker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court, supra,* 42 SAN DIEGO L. REV. at 1181.

Charging seventeen-year-old L.W. in this case as an adult is not warranted. Denying him the opportunity to have a non-partisan and neutral judicial officer make a determination based upon statutorily enumerated factors,[24] and an individualized application of those factors to his case denies him due process of law and equal protection of the law and exposes him to cruel, unusual and disproportionate punishment, all in violation of his constitutional rights. *See* Patrick Griffin, *Different from Adults: An Updated Analysis of Juvenile Transfer and Blended Sentencing Laws, With Recommendations for Reform*, National Center For Juvenile Justice (November 2008) at 7 (" . . .[T]he American Bar Association and the National Council of Juvenile and Family Court Judges . . have called for . . a return to the days in which all transfers were individualized, hearing-based, and judicially controlled") (citations omitted).

[24]*See* D.C. Code §16-2307 (e) (1-6).

III. Prosecuting Mr. W. As an Adult Violates His Right to Equal Protection

After the Supreme Court's decision in *Roper*, there should be no distinction made between the procedure by which a fifteen-year-old comes to be prosecuted as an adult in the District of Columbia, and the way a sixteen- or seventeen-year-old, like L.W., comes to be prosecuted in the Criminal Division. Although Mr. W. falls within the fifteen- to eighteen-year-old age range of youth for whom transfer hearings are statutorily contemplated and authorized, *see* D.C. Code §16-2307(e-2) (discussing the rebuttable presumption for **fifteen to eighteen** year olds), in this case, he has been prosecuted as an adult through the direct-file provision of Title 16. D.C. Code §16-2301(3). Affording some sixteen- and seventeen-year-olds, and all fifteen-year-olds, a hearing to determine whether they should be prosecuted in the Criminal Division, pursuant to D.C. Code §16-2307, while denying such proceedings to those prosecuted as adults through the direct-file provision of Title 16, D.C. Code §16-2301(3), runs afoul of the constitutional right to equal protection of the laws because there is no rational relationship between those age-based differences and a legitimate governmental purpose. *Romer v. Evans*, 517 U.S. 620 (1996) (because it bore no rational relationship to a legitimate governmental purpose, state statute that excluded homosexuals from protection under anti-discrimination laws, violated the Equal Protection Clause and was therefore unconstitutional). Moreover, because it is now clear that the brains of fifteen-year-olds are not necessarily any more developed than those of sixteen- or seventeen-year-olds, youth like Mr. W., who are sixteen- or seventeen-years-old should be entitled to receive the same judicial determination regarding whether adult prosecution is warranted that their fifteen-year-old counterparts receive. There is no rational

basis for treating persons who are fifteen years old any differently than those who are sixteen or seventeen.

IV. Prosecuting Mr. W. In The Criminal Division Violates His Right To Substantive and Procedural Due Process of Law

The right to substantive due process of law emanates from "protections 'so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1991) *citing Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.). It is "'the teachings of history [and] solid recognition of the basic values that underlie our society'" that give rise to the right to substantive due process of law. *Id.* at 122-123, *citing Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment).

The treatment of juveniles charged with breaking the law long has been discussed in Supreme Court jurisprudence. The Supreme Court has recognized that the decision to prosecute a juvenile as an adult is one that has "tremendous consequences" and "is a 'critically important' action determining vitally important statutory rights of the juvenile." *Kent v. United States*, *supra*, 383 U.S. at 554, 556. *See also Tucker v. United States*, *supra*, 407 A.2d at 1071 ("the decision whether an accused is subject to juvenile or adult court is a vitally important one which affects not only the length of commitment but many collateral interests such as the loss of civil rights, the use of an adjudication in subsequent proceedings, and disqualification from public employment"), *citing Kent*, 383 U.S. at 556-557. Juvenile court grew out of a sense that it was not appropriate to apply to children "adult procedures and penalties" nor to impose upon them "long prison sentences and mix[them] in jails with hardened criminals." *In re Gault*, 387 U.S. 1, 15 (1967). The doctrine of *parens patriae* mandates that "society's duty to the child [cannot] be confined by the concept of justice alone . . [but must] ascertain . . 'how [the child became] what

he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.'" *Id.*, *quoting* Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-120 (1909).

For a statute to withstand a constitutional challenge that it violates the substantive due process clause of the Fifth Amendment, it must be rationally related to a legitimate governmental purpose. *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding unconstitutional as a violation of the right to substantive due process a statute that criminalized consensual homosexual acts between consenting adults because it was not rationally related to a legitimate governmental purpose). *See also Overton v. Bazetta*, 539 U.S. 126 (2003) (upholding prison regulations regarding visitation of inmates by minor children and discussing the rational relationship of each regulation to legitimate state interests advanced by the various regulations); *Reno, et al. v. Flores, et al.*, 507 U.S. 292 (1993) (upholding Immigration and Naturalization Service regulations limiting persons to whom detained juveniles may be released as rationally related to the legitimate state interest in "'preserving and promoting the welfare of the child'"), *quoting Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

Given the great strides in substantive knowledge regarding adolescents that have been made since *Bland* was decided over three decades ago, the "direct file" provision of the District of Columbia Code, lacking any criteria to be applied in determining whether to prosecute a child as an adult, and devoid of any opportunity for judicial review of a prosecutorial decision to prosecute a child as an adult, is not rationally related to a legitimate governmental purpose. *See generally* Joshua T. Rose, *Innocence Lost: The Detrimental Effect of Automatic Waiver Statutes On Juvenile Justice*, 41 BRANDEIS L. J. 977 (2003).

Independent of violating the right to substantive due process, D.C. Code §16-2301 (3), also violates the right to procedural due process by allowing the prosecutor to select the Criminal Division as the forum in which to prosecute Mr. W. . Marisa Slaten, *Juvenile Transfers To Criminal Court: Whose Right is It Anyway?*, 55 RUTGERS L. REV. 821, 847 ("Criminal court prosecution is of such tremendous consequence that it should not occur absent due process of law. Only individual consideration of each juvenile provides the requisite procedural safeguards to offset the inherent over-inclusiveness of the statutory exclusion") (2003), *citing, inter alia, Hughes v. State*, 653 A.2d 241, 250 (Del. Sup. Ct. 1995) (*en banc*). "Once [the state has created a juvenile court] . . . the decision to deprive certain children of the benefits of those courts ha[s] to comport with due process fundamental fairness." Ellen Marrus, Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court, supra*, 42 SAN DIEGO L. REV. at 1170, *citing, inter alia, Douglas v. California*, 372 U.S. 353, 357 (1963); *Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985). Accordingly, the fact that the Family Division did not have original jurisdiction over Mr. W. does not mean that he is not protected by the due process clause. *See* Marisa Slaten, *Juvenile Transfer To Criminal Court: Whose Right is It Anyway? supra*, 55 RUTGERS L. REV. at 846 ("Lack of original jurisdiction . . does not justify waiver without a hearing.)

In Mr. W's' case, he is the victim of that statutory over-inclusiveness and the failure to provide him individual consideration. Indeed, the statute itself contemplates full-fledged due process hearings for sixteen- and seventeen-year-olds. *See* D.C. Code §§16-2307 (a)(1) (discussing hearings for children "fifteen **or more** years of age), (e-2) (discussing the rebuttable presumption at hearings for children 15 **through 18** years of age").

As the Honorable Skelly Wright observed in *Bland*:

> *Kent* rested, not on some fine point of metaphysics, but on the crucially important distinction between the treatment afforded children in an adult court and that granted them in Family Court. Of course that distinction is just as important whether the selection of the adult forum is spoken of as the divestiture of an existing, exclusive juvenile jurisdiction or as the initial choice of a concurrent adult jurisdiction. In either case, the consequences to the child are precisely the same and, hence, the procedural protections should be identical.
>
> *****
>
> . . [T]he United States Attorney ends the defendant's status as a child by charging him with an enumerated crime. Thus the United States Attorney's charge acts to divest the Juvenile Court of its pre-existing exclusive jurisdiction in precisely the same manner as does the juvenile judge's waiver decision. Since the divestiture is the same, the procedural rights accompanying it should be the same and we need look no further than *Kent* to determine what those rights are.

Bland, 153 U.S. App. D.C. at 268-269, 472 F.2d at 1343-1344 (Wright, J., dissenting). As Judge Wright succinctly explained, "it cannot be doubted that the United States Attorney is certainly a less disinterested decision maker than the Juvenile Court judge" and "the test for when the Constitution demands a hearing depends not on which government official makes the decision, but rather on the importance of that decision to the individual affected." *Bland*, 153 U.S. App. D.C. at 269, 270 472 F.2d at 1344, 1345 (Wright, J., dissenting). *See also* Sally T. Green, *Prosecutorial Waiver Into Adult Court: A Conflict of Interests Violation Amounting To The States' Legislative Abrogation Of Juveniles Due Process Rights*, 110 PENN. ST. L. REV 233, 234-235 ("In our criminal justice system, if the prosecutor is the state, then as state he also serves as *parens patriae* in our juvenile justice system. Therein lies an inherent conflict that violates basic principles of due process that are afforded any criminal defendant, much less juvenile defendants.") (2005) (citations omitted). For Mr. W., the effect of being charged as an adult, is no less harrowing because the Office of the United States

Attorney has elected to proceed in the Criminal Division, than if a judge, after hearing the specific facts and circumstances of the offense and Mr. W's' life, had made the same decision. The only difference is that Mr. W. would have known that the decision had been made by a neutral entity after a full and fair hearing at which all relevant information had been presented.

A. Recent Advances in Science Demonstrate That Any So-Called "Justifications" For Prosecuting Mr. W. As An Adult Are Not Rationally Related To A Legitimate Governmental Purpose

If the prosecution of juveniles in the adult system is premised on the need for harsher punishment to deter future illegal behavior, that reasoning no longer supports the "direct-file" provision of the D.C. Code because the new science demonstrates that the objectives of deterrence and recidivism reduction are not achieved by prosecuting children as adults. *See* Matthew William Bell, *Prosecutorial Waiver in Michigan and Nationwide*, 2004 MICH. ST. L. REV. 1071, 1090 (2004) ("A number of studies have demonstrated that contrary to public perception, waiver of juveniles to adult court and subsequent adult incarceration and adult penalties actually increases the rate of recidivism among juvenile offenders."), *citing* Jeffrey Fagan, *Separating the Men From The Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions On Recidivism Among Adolescent Felony Offenders* in A SOURCEBOOK: SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS 238 (James C. Howell *et al.*, eds. 1995). Judge Wright recognized the danger of prosecuting a youngster like Mr. W. as an adult to include that "impressionable sixteen- and seventeen-year-olds . . . will be packed off to adult prisons where they will serve their time with hardened criminals . . [having been] . . . sentenced . . .without any meaningful inquiry into the possibility of rehabilitation through humane juvenile disposition. . . [T]here is no denying the fact that we cannot write these children

off forever. Some day they will grow up and at some point they will have to be freed from incarceration." *Bland, supra*, 153 U.S. App. D.C. at 274, 472 F.2d at 1349 (Wright, J., dissenting). For those reasons Mr. W. should be prosecuted in the Family Division, or at the very least, should have a full adversary hearing pursuant to D.C. Code §16-2307, before a judicial officer, before he is prosecuted as an adult in the Criminal Division.

As explained by Professor Feld,

> [A]ll of the developmental characteristics that render adolescent offenders less culpable--impaired judgment and reasoning, limited impulse control, and susceptibility to peer influences--also reduce the likelihood that the threat of execution or draconian sentences will have any appreciable deterrent effect on younger offenders decisions to commit crimes.

Feld, *supra* Note 11, 32 HOFSTRA L. REV at 521. The Supreme Court also acknowledged as much in *Roper*. *See Roper* 542 U.S. at 571-572 ("the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juvenile will be less susceptible to deterrence.") In short, subjecting sixteen- and seventeen-year-olds to lengthy adult sentences is not rationally related to the objective behind prosecuting them as adults. Joshua T. Rose, *Innocence Lost: The Detrimental Effect of Automatic Waiver Statutes On Juvenile Justice, supra*, 41 BRANDEIS L. J. at 993 ("The legitimate governmental objective is to protect society from violent harmful youth that would otherwise – absent automatic waiver provisions -- be released from the custody of juvenile detention upon inception of their [twenty-first] birthdays . . . Although legitimate, this governmental objective is not rationally related to the **automatic** waiver statutes.") (emphasis supplied).

Moreover, to the extent adult prosecution of juveniles was justified as necessary because the juveniles charged with violent offenses were more culpable and dangerous than other juveniles, the science now shows that impulsive, risky and dangerous behavior is something that

youth will outgrow naturally with the passage of time. Marisa Slaten, *Juvenile Transfers To Criminal Court: Whose Right Is It Anyway?* 55 RUTGERS L. REV at 845 ("To the extent that waiver prevents a juvenile from reconciling his behavior or **maturing out of** his delinquency, the process contradicts the direct purpose of the juvenile justice system.") (emphasis supplied) (citation omitted). The Supreme Court acknowledged as much in *Roper*:

> The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson[v. Texas*, 509 U.S. 350,]368 (1993); *see also* Steinberg & Scott [*Less Guilty By Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009,]1014 [(2003)] ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").

543 U.S. at 570.

To ensure that a youth's dangerousness will be addressed, it is not necessary to subject a juvenile to a lengthy sentence, often several decades long, as are imposed in the Criminal Division for murder, first-degree sexual abuse, burglary in the first degree, armed robbery, assault with the intent to commit any of the foregoing offenses, because by one's early twenties the brain will have developed to the point where such risky and dangerous behavior is less likely to occur in the first place. For that reason, there must be an individualized determination for each child that, based on her/his specific characteristics and background, s/he poses a risk that will not be outgrown and that requires prosecution in the Criminal Division. Such an

individualized determination will ensure that only those youth who properly should be prosecuted as adults are so prosecuted.

To the extent that prosecution of juveniles in the Criminal Division was justified on the notion that it provided additional deterrence and was effective in the prevention of future crime, that premise is no longer born out by the evidence. Prosecuting minors as adults in the Criminal Division does not bear a rational relationship to the deterrence of criminal behavior because "'the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence . .' because "[a]dolescents do not do 'cost-benefit' analyses." Ellen Marcus and Irene Marker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, *supra*, 42 SAN DIEGO L. REV. at 1181-1182, *quoting Roper v. Simmons*, 125 S. Ct. at 1196. Indeed, far from advancing a legitimate state interest and therefore being rationally related to it, "studies show that long prison sentences for children result in a greater likelihood of recidivism." *Id.*, *citing*, Ira M. Schwartz, JUSTICE FOR JUVENILES 52-53 (1989).

V. The Direct File Provision Violates The Eighth Amendment

In *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court held that a sentence of ninety-days for the status of being a narcotic addict constituted cruel and unusual punishment in violation of the Eighth Amendment. In so doing the Supreme Court recognized that "narcotic

addiction is an illness." 370 U.S. at 667. In relevant part the Supreme Court in *Robinson* observed:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement or sequestration. But in light of contemporary knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an affliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Robinson v. California, 370 U.S. at 666. *See also Robinson*, 370 U.S. at 668-668 (Douglas, J., concurring) ("While afflicted people may be confined either for treatment or for the protection of society, they are not branded as criminals.")

The analogy to prosecution as adults of sixteen- and seventeen-year-olds charged with criminal offenses is apt. Like narcotics addicts, juveniles alleged to have committed a delinquent act are considered to be in need of "care and rehabilitation." D.C. Code §16-2301(6). While that may justify "confinement or sequestration," punishment as such does not have a role in the juvenile system. While youth who actually commit delinquent acts have done more than evidence the mere status of being a juvenile, to some extent delinquent acts are explained, though not justified, through an understanding that the adolescent brain is not fully developed. The District's entire juvenile system is premised on the understanding that delinquent acts are manifestations or symptoms of a youth's need for care and rehabilitation. To then subject such youth, like Mr. W., to punitive adult prosecution, without the opportunity for an individualized judicial determination that he properly should be subject to a punitive system, violates the Eighth Amendment. As one observer has noted, through an individualized judicial determination "[t]he type of juvenile offender that the [automatic waiver] statutes intend to protect society from, one

that is no longer amenable to rehabilitation by the juvenile system, would be transferred via judicial waiver by a judge that has determined the totality of the circumstances and facts surrounding the juvenile and the alleged offense." Joshua T. Rose, *Innocence Lost: The Detrimental Effect of Automatic Waiver Statutes On Juvenile Justice, supra*, 41 BRANDEIS L. J. at 993. The District's "direct file" provision under which Mr. W. has been charged in the Criminal Division has by-passed any such individualized judicial determination.

Beyond the prohibition on cruel and unusual punishment the Eighth Amendment also protects against punishment disproportionate to the offense committed. *See generally Solem v. Helm*, 463 U.S. 277 (1983). Subjecting sixteen- and seventeen-year-olds to decades of their lives in prison, when they have not been on the planet for even two decades, and given what has recently come to light about the development of the adolescent brain, is disproportionate.

The need for punishment *qua* punishment is based upon an offender's culpability. Culpability has been recognized as "a shorthand for several interrelated phenomena, including responsibility, accountability, blameworthiness, and punishability." Laurence Steinberg, Elizabeth Cauffman "*The Elephant In The Courtroom: A Developmental Perspective on The Adjudication Of Youthful Offenders*," 6 VA. J. SOC. POL'Y & L. 389, 404-405 (1999). Beyond the "cognitive and social-cognitive capabilities that are potentially relevant to the assessment of blameworthiness, . . . [are] . . also . . certain capabilities that are more interpersonal or emotional than cognitive in nature. *Id.* at 407. These "psychosocial capabilities" include "the ability to manage one's impulses, to manage one's behavior in the face of pressure from others to violate the law, or to extricate oneself from a potentially problematic situation." *Id.*

Culpability also has been explained as "the degree to which a defendant can be held accountable for his or her actions." Elizabeth Cauffman, Jennifer Woolard, N. Dickon Reppucci,

"*Justice for Juveniles: Perspectives on Adolescents' Competence and Culpability*," 18 QLR 403, 415-416 (1999).

> Culpability concerns the degree to which a defendant can be held accountable for his or her actions. In this context, immature judgment is considered as a possible mitigating circumstance which would render the defendant less blameworthy for transgressions committed. . . . [Y]ouths' offenses may stem in part from deficiencies in psychosocial factors that adversely affect judgment. If this is the case, then the presumptions of autonomy, free will and rational choice on which adult criminal responsibility is based become weaker. Under such circumstances, the criminal actions of juveniles are less blameworthy than similar acts committed by adults. If this is so, then youths should be subject to less severe punishment . . . A legal response that holds youthful offenders accountable, while recognizing that they are less culpable than their adult counterparts, would provide criminal punishment without violating the underlying principle of proportionality, which suggests that punishment should be based, in part, on the blameworthiness of the offender.

Id.

> Because the criminal law presumes free-willed moral actors -- those who morally can be blamed for wrong-doing -- it deems less culpable those whose capacity to make rational choices or whose ability to exercise self-control is significantly constrained by external circumstances or individual impairments. Youthfulness affects the actor's abilities to reason instrumentally and freely choose behavior, and locates an offender closer to the diminished responsibility end of the continuum than to the fully autonomous free-willed actor.

Feld, *supra,* 32 HOFSTRA L. REV. at 500-501 (citations omitted). Based on what is now known about the human brain at age seventeen, necessarily Mr. W., even if found guilty of the charged offense, was less a "fully autonomous free-willed actor" and more a youth whose impaired ability to reason effected his behavior. As such, his prosecution as an adult is not warranted.

> Criminal responsibility and moral blameworthiness hinge on cognitive and volitional competence. In a framework of deserved punishment, it is unjust to impose the same penalty on offenders who do not possess comparable culpability. Younger offenders are not as blameworthy as adults because they have not yet fully internalized moral norms, developed sufficient empathic identification with others, acquired adequate moral

> comprehension, or had sufficient opportunity to learn to control their actions. In short, they possess neither the rationality--cognitive capacity--nor the self-control--volitional capacity--to justify equating their criminal responsibility with that of adults.

Id. at 502 (citations omitted).

> Penal proportionality dictates shorter sentences for youth because of diminished responsibility. While criminal law presumes autonomous choices by free-willed actors, adolescents have not yet acquired experience, self-control, and maturity of judgment to validate such a presumption. Even if a youth is criminally responsible for causing a particular harm, the law should not treat her choices as the moral equivalents of an adult's and impose the same sentence. Political sound-bites--"Adult crime, adult time," or "Old enough to do the crime, old enough to do the time"--provide simplistic answers to complex moral and legal questions.

Id. at 543. *See also* 6 VA. J. SOC. POL'Y & L. at 409 ("many individuals do not demonstrate adult-like psychosocial maturity or judgment even at age seventeen") (citation omitted).

In a similar vein Professor Feld has explained:

> Shorter sentences recognize that young offenders' choices differ qualitatively from those of adults and enable them to survive their serious mistakes with a semblance of life chances intact. They also recognize that the same-length sentences impose a greater "penal bite" on younger offenders than they do on their older counterparts. A formal mitigation of punishment based on youthfulness avoids inflicting disproportionately harsh penalties on less culpable offenders without excusing their criminal conduct. Youthfulness constitutes a categorical form of diminished responsibility because young people as a group make choices that differ qualitatively from those of adults. . . . The research evidence is strongest that the maturity of judgment and adjudicative competence of the youngest adolescents is qualitatively lower than that of typical adult offenders. . . .Because reduced culpability provides the rationale for youthful mitigation, younger adolescents bear less responsibility and deserve proportionally shorter sentences than older youths.

Feld, *supra*, 32 HOFSTRA L.REV. at 551-552.

As acknowledged by one author "when the individual under consideration is younger than seventeen, . . . **developmentally-normative immaturity should be added to the list of**

possible mitigating factors, along with the more typical ones of self-defense, mental state and extenuating circumstances." *Id. citing* 6 VA. J. SOC. POL'Y & L. at 410 (emphasis supplied). *See also* Kim Taylor-Thompson, "*States of Mind/States of Development*," 14 STAN. L. & POL'Y REV 143 (2003). With these observations in mind, prosecuting Mr. W. as an adult is not warranted, and there is no assurance on the record about what factors were considered by the United States Attorney's Office before charging him in the Criminal Division.

VI. The Government's Failure To Exercise Discretion In Its Title 16 Charging Decisions Constitutes An Abuse of Discretion

Even were the Court to follow precedent from over thirty years ago, without regard to the intervening legal and scientific developments that have occurred, the observations made by the Court of Appeals for the District of Columbia Circuit in *Bland*, make clear that Mr. W. should not be prosecuted as an adult. In upholding D.C. Code § 16-2301, the Court of Appeals in *Bland* discussed the legislative history of that provision at length. It is clear from a review of that legislative history, as recounted in *Bland*, that the child envisioned to be prosecuted as an adult was not Mr. W.. First, the Court of Appeals recognized that D.C. Code § 16-2301 was designed for "**certain** individuals between the ages of 16 and 18" but not for all of them. *Bland*, 472 F.2d at 1332, 153 U.S. App. D.C. at 257 (emphasis supplied). Ignoring the legislative intent behind §16-2301(3), s*ee supra* at 6-10, the government usually invokes the shield of "prosecutorial discretion" in its effort to defeat the challenge to its charging decisions.

Beyond being inconsistent with the statute's legislative history, the prosecutorial duty to exercise discretion is abrogated where there is a failure to exercise discretion because that failure itself is an abuse of discretion. *See supra* at 6-10. It has become apparent that in the District of Columbia the decision to charge a sixteen- or seventeen-year-old as an adult is a mere ministerial act, *i.e.*, a matter of completing some paperwork and does not involve an individualized

determination with respect to the specific youth and his background, but instead involves only a "formula" based upon the alleged criminal offense he committed caused the USAO to charge him as an adult. *See Pettit*, cited at pp. 6-7, *supra*. Moreover, it has become apparent that the USAO lacks the internal guidelines by which to determine which youth to charge as adults. Seemingly that accounts for the extraordinarily high and disproportionate numbers of sixteen- and seventeen-year olds charged with first- or second-degree murder by the United States Attorney's Office, contrary to the admonition of the American Bar Association that guidelines be developed for the exercise of discretion. *See* p. 7, *supra*.

In this case it is clear that Mr. W. is a prime example of someone who decidedly should not be prosecuted as an adult. This then exemplifies the USAO's failure to limit which 16- to 18-year olds it prosecutes as adults. **Mr. W. has never been arrested before as either and adult or as a juvenile. He was effectively orphaned when his mother died and his father abandoned him, leaving him to be raised by relatives**. In contrast to the young boy before this Court, in *Bland*, the Court made clear that the 16- to 18-year-olds contemplated for prosecution under D.C. Code §16-2301(3) were those who were "beyond rehabilitation." 472 F.2d at 1332, 257 U.S. App. D.C. at 257. Mr. W. does not fit that description. Assuming *arguendo,* there is any merit to the offense charged, the Family Division has "techniques, facilities and personnel available" to treat Mr. W.. D.C. Code §16-2307(e)(5).

In the context of other challenges akin to this one the government has refused to disclose what (if any) criteria it claims to use in determining which 16- and 17-year olds it will prosecute in the Criminal Division. It also has provided extraordinarily revealing, although inadequate,

data regarding the numbers of 16- and 17-year-olds it has declined to prosecute for first- or second-degree murder **since the inception** of D.C. Code § 16-2301. Much can be gleaned from both the government's refusal to disclose the criteria it claims to use in deciding which sixteen- and seventeen-year olds to prosecute as adults and also from the data regarding minors it has prosecuted as adults for homicide.

The apparent non-existence of criteria used by the USAO in deciding whether a specific youth should be prosecuted in the Criminal Division is decidedly relevant to whether there is a failure of the Office of the United States Attorney to exercise discretion with respect to which 16- and 17-year olds it charges in the Criminal Division, thereby constituting an abuse of discretion.

A. The Government's Failure To Comply With A Past Court Directive To Produce The Criteria Used In Determining To Charge A Youth As An Adult Supports An Adverse Inference Against The Government

Three years ago, despite a judicial Order to do so, in *United States v. Alishia Carrington*, Criminal Case No. 2006 CF1 17652, the government refused to disclose the "criteria used" in determining which sixteen- and seventeen-year olds to charge as adults. That refusal supports an adverse inference against the government that it lacks any criteria whatsoever for its Title 16 charging decisions. This, then, supports Mr. W.' argument that the government fails to exercise discretion regarding which sixteen- and seventeen-year olds to prosecute in the Criminal Division. *See N.L.R.B. v. International Ass'n of Bridge Structrual and Ornamental Iron Workers*, 864 F.2d 1225, 1233-1234 (5th Cir. 1989) ("In the absence of proof of . .policies, it is permissible to infer that none exist."). A fair inference from the government's failure to comply with the judicial Order in the Alishia Carrington case to produce the criteria it uses in making

charging decisions on sixteen- and seventeen-year-olds, is that the USAO lacks internal guidelines by which it makes those determinations.

In another context challenging a prosecution of a class of people, *i.e.*, protestors, the District of Columbia Court of Appeals recognized the propriety of discovery of the charging decision in the Office of the United States Attorney, although on the facts of that case, the Court of Appeals determined that ordering discovery was premature. *See Federov v. United States*, 600 A.2d 370, 382-386 (D.C. 1991). In *Federov*, the defendants challenged the policy of the United States Attorney's Office of denying diversion to demonstrators. Instead of deeming discovery of the United States' Attorney's Office's policies ripe, the Court of Appeals said that, upon remand, the trial courts should "hold an initial hearing to determine whether the government c[ould] give a 'clear and reasonably specific' explanation based on 'legitimate reasons'" for its decision to deny the defendants diversion. 600 A.2d at 383. Both the failure to disclose, even *in camera*,[28] the criteria used by the USAO and the preliminary statistical analysis of the numbers of youth prosecuted as adults by the USAO suggest that the government does not exercise any discretion whatsoever. *See* Appendix. This Court should require the government to do more than what the Court of Appeals found unsatisfactory in *Federov*, *i.e*, "respond . . perfunctorily" and should not accept mere assertions that discretion is exercised, without any actual proof regarding how discretion is exercised in deciding to charge a youth as an adult. *Id.* Just as the Court of Appeals in *Federov* found such claims about the government's diversion

[24]Even if, *arguendo*, the government should not have to provide the defense with the relevant information, at the very least, it should have provided the information to Judge Gardner in the *Alishia Carrington* case so that he could conduct an *in camera* inspection of any policies, guidelines, and criteria the Office of the United States Attorney contends it uses in deciding whether to charge a sixteen- and seventeen-year-old as an adult. *See Federov*, 600 A.2d at 384-385.

"policy" as made to the trial courts in that case[29] insufficient, any unsupported claims by the government that it exercised discretion in charging first-offender L.W. as an adult would be insufficient in the context of this challenge. It is reasonable to doubt that any such criteria exist and have been memorialized.[30]

The adverse inference against the government based upon its failure to produce the criteria it uses in determining whether to charge a given sixteen- or seventeen year-old as an adult in the Criminal Division, is strengthened by the sworn declarations of Public Defender Service lawyers who have represented a total of nineteen sixteen- and seventeen-year-olds charged as adults.[31] In each of those cases the youth had no prior juvenile adjudications and no

[29]In *Federov* the Office of the United States Attorney had made inadequate showings to the trial courts, *i.e.*, Judges Richard Salzman and Alfred Burnett.

[30]In the absence of memorialization, there is no way to ensure uniform and consistent application of criteria by different papering assistants and supervisors in the Office of the United States Attorney.

[31]Table of Sixteen- and Seventeen-Year Olds With No Prior Juvenile Adjudications or Adult Convictions Charged As Adults In The Criminal Division

Name	**Date of Birth**	**Age At Time Charged As Adult**	**Case Number**	**Charge**
Brevard, Samuel	2/4/88	16	2004 FEL 5910	Armed Robbery
Brewster, Kenneth	3/23/88	17	2005 FEL 3352	Murder One While Armed
Brown Kinel	8/31/88	16	2004 FEL 5909	Armed Robbery
Coleman, Carlton	12/28/87	16	2004 FEL 5908	Armed Robbery
Gonzalez, Silvia	5/14/89	16	2006 CF3 34756	Armed Robbery
Gray, Joseph	10/30/89	16	2006 CF3 11189	Armed Robbery
Jackson, Marcel	2/10/87	17	2004 FEL 7685	Armed Robbery
Johnson, Arthur	7/29/89	16	2005 FEL 6070	Armed Robbery
Lee, Darnell	10/12/88	16	2005 FEL 2913	Armed Robbery
Lewis, Davon	7/7/88	17	2006 CF3 8849	Armed Robbery
Miller, Tyree	9/4/88	17	2006 CF3 8126	Assault With Intent to Murder
Moore, Michael	12/6/88	17	2006 CF3 15176	Armed Robbery
Morales-Portillo, Carlos	10/19/82	16	1999 FEL 7763	Second-Degree Murder
McCoy, Cortez	10/3/87	16	2004 FEL 2721	First-Degree Murder

prior adult convictions when they were charged in the Criminal Division.[32] The fact that there are so many youth without prior juvenile adjudications or adult convictions, imperfect though the methodology of collecting that data was, itself is telling. It suggests that even the most basic criteria, *i.e.*, prior juvenile adjudications or criminal convictions, are not used by the government in deciding which youth to charge as adults. *See* D.C. Code §16-2307(e) (1-6) (setting forth the factors, including, *inter alia*, "the extent and nature of the child's prior delinquency record," to be weighed in a judicial determination about whether to transfer a child for prosecution as an adult in the Criminal Division).

The charging as adults of youth with no prior juvenile adjudications is inconsistent with the philosophy underlying D.C. Code §16-2310 that it be reserved for "**certain** individuals

Pittman, Avon	6/2/89	17	2006 CF1 26917	Attempted First Degree Sexual Abuse While Armed
Robinson, Julius	9/18/87	17	2005 FEL 2561	Armed Robbery
Seegars, John	5/19/89	17	2006 CF3 28419	Armed Robbery
Shaheed, Shakur	1/30/90	16	2006 CF3 19261	Armed Robbery
Stoutamire, Terrance	11/30/88	17	2004 FEL 7514	Armed Robbery

[32]Admittedly, the method by which this number was ascertained lacked scientific or statistical rigor, but if anything, it undercounted the numbers of sixteen- and seventeen-year-olds charged as adults who had no prior juvenile adjudications or adult convictions because it relied on lawyers volunteering the information and further upon their accurately recollecting all the "Title 16" clients they had represented. Moreover, it was imperfect because, not only did it not include lawyers who declined to respond to the inquiry or whose memories lapsed about specific clients, it did not include clients represented by lawyers who had left the agency, lawyers who were on leave, or other Title 16 clients, not represented by the Public Defender Service. For example, with respect to clients not represented by the Public Defender Service, undersigned counsel was advised of two sixteen-year-olds, who apparently did not have prior juvenile adjudications or criminal convictions, yet were charged with armed robbery as co-defendants with the client represented by the Public Defender Service. They were Kinel Brown (DOB: 8/31/88) charged on September 20, 2004 in 2004 FEL 5909, and Carlton Coleman (DOB: 12/28/87), charged on September 20, 2004, in 2004 FEL 5908.

between the ages of 16 and 18" but not for all of them.[33] The fact that the USAO charges as adults youth never previously adjudicated delinquent or convicted is a further indication that it fails to exercise discretion in its determination of which sixteen- and seventeen-year-olds to charge as adults.[34]

B. What The Limited Numbers Provided By The Government And Alternate Data Sources Demonstrate

Data available from the Metropolitan Police Department reveals that between 1980 and 1997 there were 165 homicides committed by persons between the ages of 12 and 17.[35] *See* Exhibit B (appended hereto).[36] Moreover, the data from the government suggests that for one of

---

[33] *United States v. Bland*, 153 U.S. App. D.C. at 257, 472 F.2d at 1332.

[34] These numbers are even more disturbing given the recognition that prosecuting youth as adults increases, rather than decreases, the likelihood of recidivism. *See e.g.*, RETHINKING THE JUVENILE IN JUVENILE JUSTICE: IMPLICATIONS OF ADOLESCENT BRAIN DEVELOPMENT ON THE JUVENILE JUSTICE SYSTEM (Wisconsin Council on Children and Families, March 2006) at 18 ("Studies over the past decade have confirmed that children who are tried and incarcerated as adults are more likely to recidivate than minors tried and incarcerated in the juvenile system"), *citing* Butts, J.A., *What Have Researchers Learned About Criminal Court Transfer*, Presentation on behalf of Chapin Hall at Georgetown University, January 2006; JUVENILE TRANSFER TO CRIMINAL COURT STUDY: FINAL REPORT (Florida Department of Juvenile Justice, 2002) at 25 ("transfer increases recidivism;" "transfer is more likely to aggravate recidivism than to stem it"); *Is This Justice? Punishment Backfires Under 'Adult Time,'* Barbara White Stack, PITTSBURGH POST-GAZETTE, March 20, 2001 ("The second reason 'adult time' hasn't worked is that teens sent to adult lockups are more likely to commit new crimes when they get out than teens sent to juvenile reform schools, where they get education and counseling. 'It's counterintuitive to say that punishment backfires. It's hard to get the public to understand,' said Jeffrey Fagan, a professor at Columbia University who conducted two studies showing that prison produces higher recidivism -- a term that means committing new crimes -- than reform school does.")

[35]Regrettably, since this information does not separate out how many of those 165 juveniles were sixteen- and seventeen-year-olds arrested for first- or second-degree-murder, as opposed to manslaughter, its utility is somewhat limited. This information does, however, demonstrate that the data has been collected and maintained for over a quarter century by the Metropolitan Police Department. *See* Exhibit B (appended hereto). The failure of the United States Attorney's Office to be able to provide similar information speaks volumes.

[36]Jonathan Pledger of the Violent Crimes Branch of the Metropolitan Police Department has informed undersigned counsel that the Metropolitan Police Department can provide data back to 2000 regarding all the sixteen- and seventeen year-olds arrested for murder, and that as of 2007, it has started keeping data on the numbers of sixteen- and seventeen-year-olds charged with murder who are prosecuted as adults in the Criminal Division.

the few years that it does provide "approximate" numbers, *see* Gov't's Response in *Alishia Carrington* at 4, ¶ 7, *i.e*, 2005, it prosecuted in the Criminal Division 100% of the juveniles arrested for murder. Because the government failed to provide more than the numbers of Title 16 homicide prosecutions since 1999,[37] the Public Defender Service independently pursued the information from the Clerk of the Superior Court for the District of Columbia contained in the Appendix to this Motion.

Even using the government's own, albeit inadequate, data, since 1999 that it provided in the *Alishia Carrington* litigation, the government has prosecuted 45 juveniles as adults, and has only declined to prosecute four.[38] In that case the government contended that since 2002, it has prosecuted 22 juveniles as adults for homicide, and declined to prosecute four. In other words, even using those figures, the government has prosecuted 82% of the juveniles as adults since 2002. Given the numbers of youth with no prior records prosecuted as adults, as reflected in Note 30, *supra*, either 91% (41 of 45) or 82 % (18 of 22) is an extraordinarily high figure. In light of the government's failure to provide information could be used meaningfully by either the Court or the defense, *e.g.*, the criteria used by the USAO in deciding to prosecute a youth as an adult, and case numbers, so that characteristics of the cases prosecuted can be gleaned, the

---

[37]Only by providing the **names** of those individuals and their **case numbers**, could any assessment be done regarding how many were first-time offenders, "the nature of the charged offense and the extent and nature of the child's prior delinquency record, the child's mental condition, the child's response to past treatment efforts . . ., the techniques, facilities, and personnel available for rehabilitation [in the Family Division] . . , and the potential rehabilitative effect on the child of providing parenting classes or family counseling . . " D.C. Code §16-2307(e) (enumerating the factors that "**shall** be considered" in making a transfer decision).

[38]Inferentially, the government's statement that since 2002 it has declined to prosecute only four juveniles for homicide as adults, suggests that prior to 2002, it did not decline to prosecute as adults any of the sixteen- and seventeen-year-olds arrested for murder. Operating on that assumption, then, the government's data suggests that the 45 juveniles prosecuted for murder as adults, between 1999 and 2005 represent 91% of the juveniles arrested for murder, an even more damning statistic than limiting the comparison to 18 of 22 juveniles for the period 2002-2005.

limited numbers that were provided (without underlying identifying information) support the argument that the government fails to exercise discretion in deciding which youth to charge as adults, and that said failure constitutes an abuse of the government's discretion. That abuse of discretion, in turn, warrants exercise of this Court's power under Superior Court Criminal Rule 12(b)(1) based upon the "defect in the institution of the prosecution" of Mr. W. in the Criminal Division, to dismiss the complaint and refer the case to the Family Division, or at the very least, conduct a "reverse transfer" hearing itself.

The failure of the Office of the United States Attorney to comply with Judge Gardner's order in the *Alishia Carrington* case to provide the Court with the criteria (if any actually do exist) it uses in determining which youth to prosecute as adults, left the defense to argue from the absence of data forthcoming from the government. That absence of data made readily apparent that **the government fails to exercise any discretion regarding which youth to prosecute as adults and instead, reflexively prosecutes any eligible youth as an adult, irrespective of the youth's role in the alleged offense, the youth's prior delinquency record, the youth's mental condition, any past treatment efforts, and the techniques, facilities, and personnel available for rehabilitation through prosecution in the Family Division**. *See* D.C. Code §16-2307.[39]

Undersigned counsel has endeavored to provide a statistical analysis, as well as examining as many court records as the Public Defender Service has been able to access, to discern the characteristics of the offense(s) and the youth charged as adults with homicides between 1998 and 2005, in an effort to demonstrate that in a significant number of cases, had a

[39]In the absence of the government providing any criteria it uses, the Public Defender Service has resorted to using the factors that have been statutorily determined to be relevant to a decision whether to prosecute a minor as an adult in the Criminal Division. Hence, the Public Defender Service has examined the case files to which it has access through the prism of the factors set forth in the transfer statute, *i.e.*, D.C. Code §16-2307.

transfer hearing been afforded (or had the USAO exercised any discretion whatsoever), there were circumstances that suggested that not all of the cases warranted prosecution in the Criminal Division.

Year	Data from Metropolitan Police Department[40]	USAO Numbers of 16- and 17-year olds Prosecuted for Murder	Criminal Division Files (Numbers of 16- and 17-year olds Prosecuted for Murder)	Family Division (Numbers of 16- and 17-year olds Prosecuted for Murder)	Percent of 16-17-year-old Homicide Arrests Prosecuted As Adults
1998	27 (1998-2000)[41]		14 (+2 that were transferred under D.C. Code §16-2307		[42]
1999	27 (1998-2000)[43]	13	11 (+2 that were transferred under D.C. Code §16-2307)		
2000	27 (1998-2000)[44]	7	2		
2001		3	5		
2002	2	9	7 (+2 that were transferred under D.C. Code §16-2307)		
2003		5	7		
2004	2	6	7		

[40]Source: http://ojjdp.ncjrs.org/ojstatbb/asp/profile.asp (for 1980-1995, 1997); Metropolitan Police Department www.mpd.dc.gov Exhibit B (appended hereto)

[41]Source: Murder Analysis: A Study of Homicides In The District of Columbia (Metropolitan Police Department, October 2001) at p. 24 (appended hereto as Exhibit C).

[42]The government failed to provide the number of youth it prosecuted in the Criminal Division for murder in 1997, but even using the inadequate data provided by the government, *i.e.*, 20 cases in 1999-2000, and the more complete data provided by the Metropolitan Police Department, *i.e*, 27 cases between 1998 and 2000, that demonstrates that the government prosecuted 75% of the 16- and 17-year-olds arrested for first- or second-degree murder as adults in the Criminal Division in the period 1998 through 2000. 75% obviously understates the true percentage due to the absence of data for 1998 from the government.

[43]Source: Murder Analysis: A Study of Homicides In The District of Columbia (Metropolitan Police Department, October 2001) at p. 24 (appended hereto as Exhibit C).

[44]Source: Murder Analysis: A Study of Homicides In The District of Columbia (Metropolitan Police Department, October 2001) at p. 24 (appended hereto as Exhibit C).

2005	2	2	2		100%
2006	6				
TOTALS (1998-2005 ONLY)	39 arrests	45 cases	60 (includes 5 transfer cases, and 15 1998 cases)	8 (1999-2005)[45]	47 of 55 cases = **85%** (1998-2005, using Fam. Div. statistics) 51 of 55 cases (1998-2005) (using USAO figure that declined to prosecute 4 cases between 1999 and 2005) = **93%** 33 of 41 cases (1999-2005) = **80%** (1998-2005, using Fam. Div. statistics) 37 of 41 cases (using USAO figure that declined to prosecute 4 cases between 1999 and 2005) = **90%**

Not only has the government, thus far, thumbed its nose at a judicial Order (in the Alishia Carrington case) to provide its charging criteria (even for an *in camera* inspection),[46] and failed to provide identifying information regarding the cases behind the inadequate statistics it provided, but the numbers the government has provided are inaccurate. The total number of cases the government claimed to have prosecuted under D.C. Code §16-2301 (from 1999-2005) is **43**. The government undercounted in 2001, 2003 and 2004. Criminal Division statistics reveal that in 2001 there were five Title 16 homicide prosecutions rather than the three claimed

[45]*See* Exhibit D (appended hereto) February 12, 2007 Memorandum from Yuan Burns, Acting Director Information and Technology Division, D.C. Superior Court).

[46]*Federov v. United States*, 600 A.2d 370, 384-385 (D.C. 1991).

by the government. Likewise in 2003, the Criminal Division statistics show that there were seven Title 16 homicide prosecutions, rather than the five claimed by the government. Finally, in 2004, there were not six Title 16 prosecutions, as the government's numbers indicated, but rather seven, as reflected by the Superior Court Criminal Division statistics. Thus, the government's numbers undercounted by five cases, the numbers of youth prosecuted as adults in the Criminal Division between 2001 and 2004. In short, to date not only has the government instilled no confidence in its blanket, but wholly unsubstantiated, protestation that it does exercise discretion in deciding which youth to prosecute, but its data collection also has instilled no confidence in the accuracy of its record-keeping. Moreover, the fact that the government's numbers appear to include five cases which, by virtue of the offenders' ages, *i.e.*, fifteen at the time of the offenses, are not cases prosecuted under D.C. Code §16-2301, but rather only prosecuted as adults after a transfer hearing pursuant to D.C. Code §16-2307, reveals the government's failure to understand the gravamen of the Title 16 challenge.

Finally, without the government disclosing greater details about the four cases it claimed it elected not to prosecute in the Criminal Division between 1999 and 2005, there is no way to know whether those cases had no merit whatsoever as opposed to the government truly exercising discretion to decline to prosecute a given youth as an adult in a case with merit. Yet again, the government's recalcitrance to disclose relevant information has left intact the wholly warranted impression that the United States Attorney's Office is **not** exercising discretion in its charging decisions under D.C. Code §16-2301.

In addition to the adverse inference against the government based upon its failure to produce the criteria it uses in determining whether to charge a given sixteen- or seventeen year-

old as an adult in the Criminal Division,[47] an analysis of some of the facts and circumstances regarding the offenders, and offenses charged in the Criminal Division, as reflected in the attached appendix, clearly indicates that the government routinely charges non-principals in the Criminal Division, does not consider a youth's lack of prior adjudications or arrests, nor his/her mental health history in its charging decisions.

Moreover, from some of the sentences imposed, and the offenses of conviction, it is clear that the gravity of the accused's actual conduct, and her/his role in the offense, is not as serious as the government may have portrayed it at the inception of the case. Yet, while the government fails at the outset of a case to closely examine its facts, the accused's role and the accused's background, in nearly all homicide cases, the accused is held without bond in an adult jail, *i.e.*, the District of Columbia Detention Center. Thus sixteen-year-old Maurice Wallace, was held in 1998 FEL 7052 for seven months at the D.C. Jail on the charge of first-degree murder, only to have the case dismissed. Similarly, seventeen-year-old Saeve Evans' case, 2004 FEL 5855, was dismissed after he had been held for nine-months at the District of Columbia Detention Center. Likewise sixteen-year-old Shiraka Evans, was charged with first-degree murder in 2005 FEL 5170, only to have his case dismissed. Had the government exercised discretion before charging these youth, they would not have been subject to the trauma of arrest and adult detention.[48]

---

[47] That inference was further strengthened by the declarations of Public Defender Service lawyers who have represented a total of nineteen sixteen- and seventeen-year-olds charged as adults, who had no prior juvenile adjudications and no prior adult convictions when they were charged in the Criminal Division and that was appended to the February 7, 2007, Response to Government's Response To Court's Order for Statistical Information and for Information Regarding The Criteria Used By The Office of the United State's Attorney In Deciding Which 16- and 17-Year-Olds To Prosecute As Adults In The Criminal Division filed in the *Alishia Carrington* case. *See* Exhibit F (appended hereto)

[48] The Department of Justice has acknowledged that "[m]any detained youth are mentally ill or suffer from severe emotional disturbances" that can be exacerbated by confinement in an adult jail. JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT (October 2000), United States Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, at 16. *See also id.* at 17 ("The experience of being incarcerated is traumatic for youth, particularly when placed in an adult facility.")

An analysis of 27 of the 55 cases that were actual "Title 16 cases,"[49] as opposed to the five cases that were transferred under D.C. Code §2307,[50] is very telling. Of the 27, **three** ended in **acquittals** and **three** ended in **dismissals**.[51] In at least an additional **eleven** cases, the client was convicted, whether after trial or plea, of **offense(s) other than first- or second-degree murder**.[52] Thus in **17 of 27** cases (63%), the cases did not result in a conviction for first- or second-degree murder. In short, while the **Office of the United States Attorney prosecuted between 80% and 95%** of sixteen- and seventeen-year olds arrested for murder as adults,[53]

---

[49]The Public Defender Service has only able to review files and garner relevant information with respect to 27 of the 55 cases. Given that this is exactly half of the Title 16 homicide cases prosecuted between 1998 and 2005, it is fair to assume that this is a representative sampling and that the implications flowing from an analysis of these cases have validity.

[50] The five cases that were transferred under D.C. Code §16-2307, involved homicides allegedly committed by the accused when he was fifteen years old, and thus were not subject to "direct file" under D.C. Code §16-2301by the Office of the United States Attorney. They were Jamal Champion, Criminal Case No. 1998 FEL 5170, Stephen Moorer, Criminal Case No, 1999 FEL 6418, David Johnson, Criminal Case No. 1999 FEL 8232, David Johnson, Criminal Case No. 2002 FEL 206, and Terry Moore, Criminal Case No. 2002 FEL 4322.

[51]Mason Huddelston, Criminal Case No. 1998 FEL 1694 (acquittal); Ralph Johnson, Criminal Case No. 2003 FEL 5147 (acquitted); Cortez McCoy, Criminal Case No. 2004 FEL 2721 (acquittal); Maurice Wallace, Criminal Case No. 1998 FEL 7052 (dismissal); Saeve Evans, Criminal Case No. 2004 FEL 5855 (dismissal); Shiraka Evans, Criminal Case No. 2005 FEL 5170 (dismissal).

[52]Octavius Clarke, Criminal Case No. 1998 FEL 307 (plea to manslaughter); Anthony Michael, Criminal Case No. 1998 FEL 653 (plea to manslaughter); Xavier Exum, Criminal Case No. 1998 FEL 3174 (plea to manslaughter); Sylvia Berrios, Criminal Case No. 1998 FEL 5773 (plea to involuntary manslaughter); Duron Penn, Criminal Case No. 1998 FEL 6183 (plea to robbery); Jemina William, Criminal Case No. 1998 FEL 6712 (plea to manslaughter); Steven Lewis, Criminal Case No. 1998 FEL 9107 (plea to manslaughter);Eric Crutchfield, Criminal Case No. 1999 FEL 250 (plea to robbery and accessory after the fact to murder); Forest Lewis, Criminal Case No. 1999 FEL 437 (plea to voluntary manslaughter);Carlos Morales-Portillo, Criminal Case No. 1999 FEL 7763 (plea to manslaughter); Sandra Reyes, Criminal Case No. 2000 FEL 6170 (convicted of manslaughter while armed).

[53]The variation in the percentages is attributable to whether one is counting the relevant time period as 1998 through 2005, or 1999 through 2005. The government and the Family Division only provide data from 1999 through 2005, while the Criminal Division provides data from 1998. While the Family Division numbers indicate that there were eight 16- and 17-year olds prosecuted for first- or second degree murder between 1999 and 2005, the Office of the United States Attorney has stated that it declined to prosecute only four such cases. Absent an examination of the eight cases to which the Family Division

when all was said and done **only 37% of the cases were deemed properly first- or second-degree murder cases**, whether by virtue of further review by the prosecutor's office, a jury's determination, or a plea bargain deemed to be fair by the Office of the United States Attorney. Thus, this suggests that a failure to exercise discretion at the outset of the case, based solely on the "nature of the present offense," D.C. Code §16-2307 (e)(2), and the accused's role in that offense. Likewise, in at least **seven of the 27 cases** (26%) involved charging a non-principal, *i.e.*, someone who was merely a look-out,[54] and/or was not the trigger-person, with first- or second-degree murder, again failing to exercise discretion regarding the role a given defendant played in the offense.

Four of the twenty-seven cases (15%) contained some element of self-defense,[55] and in at least **five of the 21 cases (24%)** that resulted in some sort of conviction, *i.e.*, other than the six cases that were either dismissed or where there was an acquittal, sentences were imposed under the **Youth Rehabilitation Act**.[56] This is significant because implicit in a Youth Rehabilitation

---

numbers refer, it is difficult to have confidence that the query accurately captured the cases relevant to this challenge and was not over-inclusive. Using the government's claim that it declined to prosecute four youth as adults, out of either 55 (1998-2005) or 41 (199-2005) cases, yields percentages of adult prosecution for Title 16 homicides of 90% and 93% respectively.

[54]Duron Penn, Criminal Case No. 1998 FEL 6183 (accomplice shot decedent during a robbery); Steven Lewis, Criminal Case No. 1998 FEL 9107 (client was look-out); John Wrenn, 1999 FEL 1819 (client was not the shooter); James Brown, Criminal Case No. 1999 FEL 8900 (client was not the trigger-person); Jose Martinez-Castro, Criminal Case No. 2000 FEL 4650 (client was look-out, not trigger-person); Antonio Pleasant, 2003 FEL 638 (client was not the trigger-person); Phillip Mosby, Criminal Case No. 2004 FEL 5460 (client did not use his weapon).

[55]Anthony Michael, Criminal Case No. 1998 FEL 653; Carlos Morales-Portillo, Criminal Case No. 1999 FEL 7763; Phillip Mosby, Criminal Case No. 2004 FEL 5460 (client was with two other people previously targeted by the decedent); Shiraka Evans, Criminal Case No. 2005 FEL 5170 (client was shot at).

[56]Xavier Exum, Criminal Case No. 1998 FEL 3174; Sylvia Berrios, Criminal Case No. 1998 FEL 5773; Eric Crutchfield, Criminal Case No. 1999 FEL 250; Carlos Morales-Portillo, Criminal Case No. 1999 FEL 7763; Sandra Reyes, Criminal Case No. 2000 FEL 6170.

Act sentence is a judicial finding that the accused shows prospects of rehabilitation.[57] In this respect it is akin to the considerations in the transfer statute regarding the child's capacity for rehabilitation. *See* D.C. Code §16-2307 (e)(3), (4), and (5). Again, the inference is a fair one that the Office of the United States Attorney failed to exercise discretion by closely examining the cases at their outset, to see whether there were such indicia of potential for rehabilitation.

In addition to the many cases that involved youth without any prior juvenile adjudications, **of the 27 homicide cases reviewed**, at least **seven (26%)** involved clients who had **never been arrested before or had no prior juvenile adjudications.**[58] Mr. W. has no prior juvenile adjudications. Finally, but very significantly, a good number of the clients charged had histories of abuse or neglect, cognitive deficiencies, or other mitigating circumstances that could have been discerned had any discretion been exercised by the Office of the United States Attorney.

VI. International Law Requires An Individualized Judicial Determination Regarding Whether Mr. W. Should Be Prosecuted In The Criminal Division

International law is the law of the United States and is "supreme over the law of the several states." Restatement (Third) of Foreign Relations Law of the United States § 111. Under the Constitution of the United States, "all treaties made . . . under the authority of the

[57] *Smith v. United States*, 597 A.2d 377, 380, n. 2 (D.C. 1991) (citation omitted) ("In order to fill the void created by Congressional repeal of the [Federal Youth Corrections Act], the Council of the District of Columbia passed the Youth Rehabilitation Amendment Act of 1985 (YRA) . . .[T]he purposes and effects of the D.C. Youth Rehabilitation Act – 'rehabilitation, treatment, segregation, and expungement -- are virtually identical to the purposes and effects of the [Federal Youth Corrections Act].'"

[58] Alonzo Robinson, Criminal Case No. 1998 FEL: 8617; John Wrenn, Criminal Case No. 1999 FEL 1819; Carlos Morales-Portillo, Criminal Case No. 1999 FEL 7763; James Brown, Criminal Case No. 1999 FEL 8900; Donte Allen, Criminal Case No. 2002 FEL 3262; Michael Young, Criminal Case No. 2002 FEL 8248; Cortez McCoy, Criminal Case No. 2004 FEL 2721.

United States" are the "supreme law of the land." U.S. Const., Art. VI, Cl. 2. *See also* Restatement (Third) of Foreign Relations Law of the United States §115 (setting forth the obligations created by international law and its relation to domestic law). In *Roper* the Supreme Court found support in international law for its ruling prohibiting the execution of persons under eighteen. *Roper*, *supra*, 543 U.S. at 575-578. Likewise international law, including both treaties and "customary international law"[59] support the requirement of an individualized judicial determination before a minor is prosecuted as an adult. *See generally*, Declaration of Professor Stephen Schnably, Professor of Law, University of Miami School of Law (appended hereto as Exhibit H).

The right of a minor, like Mr. W., to special protection is well established in international law and emanates from a recognition of the "weakness, immaturity, and inexperience" of persons under eighteen years of age.[60] One example of the support in international law for an individualized judicial determination on whether to prosecute a given minor as an adult is found in Article 10 of the International Covenant on Civil and Political Rights ("hereinafter ICCPR"). It states that accused juveniles are to be separated from adults and that "treatment" of sentenced juvenile offenders is to be "appropriate to their age and legal status." ICCPR, Art. 10. The United States is a party to the ICCPR and ratified it on June 8, 1992.[61] Thus it is binding on the

---

[59]Customary international law is the "practice of states" and is determined "by imprecise methods out of uncertain materials, . . . look[ing] at a process that is worldwide and includes the actions and determinations of foreign actors (including foreign courts)" Restatement (Third) of Foreign Relations Law of the United States I, 1 Introductory Note. *See also* Restatement (Third) of Foreign Relations Law of the United States § 102, Reporters' Note 2 (regarding customary law)

[60]Inter-American Court of Human Rights, Advisory Opinion Oc-17/2002, of August 28, 2002, requested by the Inter-American Commission on Human Rights, *Juridical Condition and Human Rights of the Child*, ¶. 60, *available at* http://www.corteidh.or.cr/seriea_ing/index.html.

[61]While the United States has ratified the ICCPR, it has done so with "reservations." In international law a reservation permits a signatory to bind itself to a treaty or agreement only under certain conditions. *See* Restatement (Third) of Foreign Relations Law of the United States § 124 (defining and discussing

United States and all jurisdictions within the United States. Restatement (Third) of Foreign Relations Law of the United States § 111.

Like Article 10, Article 14 of the ICCPR supports an individualized judicial determination in its provision that, for all juveniles charged with violating a criminal law, "the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation." This precisely tracks the rationale behind the transfer provision of the D.C. Code. D.C. Code §16-2307 (enumerating all the factors to be taken into consideration in determining whether a given fifteen- to eighteen-year-old should be prosecuted as an adult). *See also Kent v. United States*, 383 U.S. 541, 566-567 (1966) (enumerating factors to be considered before charging a child with criminal offenses in the Criminal Division as an adult). It also comports with the philosophy underlying the District's juvenile justice system. The USAO's lack of standards or criteria (other than age and arrest charge), and its wholesale prosecution of sixteen- and seventeen-year-olds as adults violates these international tenets.

Beyond the ICCPR the United States also has signed, although not ratified, the Convention on the Rights of the Child (hereinafter "CRC").[62,63] Once signed, the United States is required to "refrain from acts which defeat the object and purpose of [the] treaty." Vienna Convention on the Law of Treaties, Article 18(a); Restatement (Third) of Foreign Relations Law of the United States, §312(3). The CRC provides that "[i]n all actions concerning children, . .

"reservations"). Significantly, however, the United States' reservation to Articles 10 and 14 of the ICCPR states that "the United States reserves the right **in exceptional circumstances**, to treat juveniles as adults . . " The USAO's unrestrained prosecution of all – or virtually all -- "Title 16-eligible" youth as adults is hardly consistent with the United States reservation to do so only in "exceptional circumstances."

[62] Available at http://www1.umn.edu.humantrts/instree/k2crc.htm

[63] A treaty that is signed is one that has been adopted by the executive branch, but not ratified by a two-thirds vote of the Senate or deposited with the relevant treaty body. Shamefully, only two countries, the United States and Somalia, have failed to ratify the CRC. *Roper v. Simmons*, *supra*, 543 U.S. at 576.

.[including those] . . undertaken by . . courts of law, . . .the best interest of the child shall be a primary consideration." CRC, Article 3. The failure to conduct an individualized hearing to determine whether Mr. W. warrants prosecution as an adult, instead leaving it to the partisan USAO to make that determination without any standards, criteria, judicial review or justification, violates Article 3 of the CRC and the Vienna Convention because it defeats the object and purpose of considering primarily Mr. W.' best interests. To be consistent with Article 3 of the CRC, Mr. W.' best interests would have to be both considered and deemed paramount. That cannot occur where he is being prosecuted as an adult without any consideration of his individual circumstances and based upon a unilateral and unreviewable determination by the USAO.

Further support for an individualized assessment regarding whether Mr. W. warrants prosecution in the Criminal Division is found in Article 20 of the CRC which requires that when a child is "temporarily or permanently deprived of his or her family environment . . [s/he is] . . entitled to special protection and assistance provided by the State." This is hardly achieved, and instead is affirmatively undermined in violation of the Vienna Convention, when a youth like Mr. W. is subjected to the unilateral determination of the USAO that he be prosecuted as an adult, thereby occasioning his detention at the District of Columbia Detention Center. Clearly, to comply with Article 20, there would have to be special protection and assistance given to Mr. W. based upon his unique circumstances, something that has not occurred since his detention at the inception of this case.

The USAO "direct-file" provision of D.C. Code §2301, without any judicial oversight, also abrogates the guarantee of the CRC that "every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which **takes into account the needs of persons of his or her age**." CRC, Article 37 (emphasis

supplied). This guarantee is not achieved where 1) the USAO has no criteria by which to determine whether a given youth merits prosecution as an adult, 2) there is no judicial review or oversight of those determinations, and 3) there is no judicial consideration of the accused's age, the nature of the offense alleged, and the extent and nature (or lack thereof) of the accused's prior delinquency record, his mental condition, his response to past treatment efforts, including any record of abscondances, the techniques, facilities, and personnel available for rehabilitation available in the Family Division as compared with the Criminal Division, and the potential rehabilitative effect on the accused of providing parenting classes or family counseling for one or more members of his family or for his caregiver or guardian. D.C. Code §16-2307(e). *See also Kent v. United States*, *supra*, 383 U.S. at 566-567 (enumerating factors to be considered before charging a child with criminal offenses in the Criminal Division as an adult).

Finally, Article 40 of the CRC states that every child accused of having violated a criminal law is to be "treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for human rights and fundamental freedom of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." By permitting the USAO unilaterally and without criteria or judicial review (and without an individualized determination) to decide whether to prosecute a given minor as an adult in the Criminal Division, D.C. Code §16-2301 also violates Mr. W.' rights under Article 40 of the CRC.

In addition to the text of various international laws and treaties that are violated by the USAO charging Mr. W. in the Criminal Division, pursuant to D.C. Code §2301, "customary international law" is also violated. Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement

(Third) of Foreign Relations Law §102, *cited in In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7, 130 (E.D.N.Y. 2005).

"Customary international law, like other federal law is part of the 'laws of the United States.'" Restatement (Third) of Foreign Relations Law of the United States, §111(Comment e). As explained in the Restatement (Third) of Foreign Relations Law, "the modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the state courts." Restatement §111(Comment, Reporter's Note 3). Customary law binds all states. *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d at 131. "A guide for determining proper sources of international law is the Statute of the International Court of Justice, to which the United States is a party." *Id.*, *citing Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2nd Cir. 2003). The sources of international law recognized by the Statute of the International Court of Justice, Article 38, are the same sources as those enumerated in the Restatement (Third) of Foreign Relations Law, §102. *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d at 131.

Among the sources of customary international law abrogated by Mr. W.' prosecution pursuant to D.C. Code §16-2301 are the American Convention on Human Rights,[64] the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty,[65] Declaration of the Rights of the Child,[66] and the Universal Declaration of Human Rights,[67] the United Nations

[64]Available at http://www1.umn.edu.humantrts/oasinstr/zoas3con.htm

[65]Available at http://www1.umn.edu.humantrts/instree/j1unrjdl.htm

[66]Available at http://www.unhchr.ch/html/menu3/b/25.htm

[67]Available at http://www1.umn.edu.humantrts/instree/b1udhr.htm

Guidelines for the Prevention of Juvenile Delinquency (the "Riyadh Guidelines"),[68] adopted in 1990, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules"),[69] adopted in 1985.

The importance of "customary" international law has been acknowledged by the United States Supreme Court:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works or jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The Paquete Habana, 175 U.S. 677, 700 (1900), *cited in Sosa v. Alvarez-Machain*, 542 U.S. 692, 733-734 (2004).

Significantly, the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty define a juvenile as "**every** person under the age of 18." Rule 11(a) (emphasis supplied). Likewise, the "Beijing Rules" apply to any "child or young person who . . .,**may** be dealt with for an offence in a manner which is different from an adult." Principle 2.2(a). Because Mr. W., at age seventeen, could have been prosecuted within the Family Division, he is included within the scope of the Beijing Rules. *See also* Principle 3.3 (discussing extension of the Rules' applicability to "young adult offenders"). The Beijing Rules explicitly admonish legal systems that permit juveniles to be prosecuted as adults, not to fix the "age of criminal responsibility . . at

[68]Available at http://www1.umn.edu.humantrts/instree/j2ungpjd.htm

[69]Available at http://www1.umn.edu.humantrts/instree/j3unsmr.htm

too low an age level, **bearing in mind the facts of emotional, mental and intellectual maturity**." Beijing Rule, Principle 4.1 (emphasis supplied). *See also* Riyadh Guideline 5(e) (recognizing that "youthful behaviour or conduct that does not conform to overall social norms and values us often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood").

The Beijing Rules emphasize the paramount consideration to be given the well-being of the juvenile. *See* Principle 1.1 (discussing the "well-being of the juvenile and her or his family"); Principle 5.1 (discussing the emphasis to be given to the "well-being of the juvenile"). *See also* United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, 1 (emphasizing the promotion of "the physical and mental well-being of juveniles"), Riyadh Guidelines 2 (acknowledging the importance of "respect for and promotion of [juveniles] personalit[ies] from early childhood"), 3 (stating that "[y]oung persons should have an active role and partnership within society and **should not be considered as mere objects of socialization and control**") (emphasis supplied), and 4 (emphasizing the "well-being of young persons . . "); Declaration on the Rights of the Child, Principle 2 (The child shall enjoy special protection, and shall be given opportunities and facilities, **by law** and by other means, to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and in conditions of freedom and dignity.") (emphasis supplied). These principles are violated where the prosecuting entity has no criteria in deciding whether to prosecute a youth as an adult, there is no judicial review of the prosecuting entity's decision-making, and there is no individualized determination with respect to each youth. *See also* American Convention on Human Rights, Art. 5(5) (recognizing the need for "minors subject to criminal proceedings . . .[to] be treated in accordance with their status as minors"), Article 19 (setting forth the right of

"[e]very minor child . . to the measures of protection required by his condition as a minor on the part of his family, society and the state").

Indeed, the USAO's unilateral and unreviewed blanket determination to prosecute all age- and offense-eligible youth as adults runs afoul of the commentary to Rule 5 of the Beijing Rules describing the objective, even "in legal systems that follow the criminal court model," as opposed to the family court model, that "the well-being of the juvenile . . be emphasized" and that "merely punitive sanctions" be avoided. Beijing Rules, Rule 5 (Commentary). Likewise the Commentary's admonition to consider "not only the gravity of the offense," but also a given youth's "personal circumstances" cannot be honored where the USAO has no criteria (other than accused's age and offense charged) by which it decides to prosecute a youth as an adult and where that decision is shielded from any individualized judicial review. *Id.*

In short, like treaties, customary international law cannot countenance the practice employed in Mr. W.' case pursuant to which no consideration was given by the prosecuting entity to his individual circumstances, and the Court has neither reviewed the USAO's determination to prosecute him as an adult nor made its own individualized determination, after a hearing at which the specifics of Mr. W., and not merely the offense are presented, regarding whether he warrants prosecution in the Criminal Division.

VIII. Direct File Provisions in Other Jurisdictions Have Been Struck Down

In at least two jurisdictions where challenges have been brought to "direct file" provisions or their functional equivalents, they have been struck down by the highest courts in those states. *See Hughes v. State*, 653 A.2d 241 (Del. Sup. Ct. 1995) (*en banc*); *State v. Mohi*, 901 P.2d 991 (Utah 1995).

While its statutory scheme is not entirely identical to the District's, the Delaware statute requiring transfer to adult court of any minor who turned eighteen during the pendency of her/his case was struck down as unconstitutional in *Hughes, supra*. The basis for the ruling that the Delaware statute violated the right to due process and equal protection of the law is instructive for Mr. W.' challenge. Somewhat akin to §16-2301(3), under the Delaware statute "children, regardless of age" could be prosecuted as adults if they were charged with "the most serious felonies." *Hughes*, 653 A.2d at 244, *citing* 10 Del. C. §1010(a)(2). Moreover, similar to D.C. Code §16-2307, children sixteen and over could be "transferred" by the Family Court for prosecution as adults after a determination that they were not "amenable to the Family Court processes." *Id. citing* 10 Del. C. §1010(c). As under D.C. Code §16-2307, transfer for prosecution as an adult only occurred after a hearing at which a number of statutorily enumerated factors were considered. *Id.* Moreover, unlike Title 16, the Delaware scheme had allowed for a "reverse amenability" process to allow for a transfer back to juvenile court from adult court when warranted. *Hughes*, 653 A.2d at 245, and *n. 5 citing* 10 Del. C. §1011. This process "ensure[d] a judicial determination of amenability which [was] premised upon the nature of the offense as well as the character of the child." *Hughes*, 653 A.2d at 245, *citing State v. Anderson*, 385 A.2d 738, 741 (1978).

The Delaware statute was amended to require the automatic transfer for prosecution as adults those children charged with felonies who reached their eighteenth birthdays before adjudication in the Family Court and also to eliminate the "reverse amenability process." *Hughes*, 653 A.2d at 247. It was the elimination of the "reverse amenability" provision that caused the Delaware Supreme Court to hold that the amended statute violated the right to due process and equal protection of law. In reaching that conclusion the Delaware Supreme Court's

observations are instructive for Mr. W.' challenge because they speak to the importance of an independent judicial determination before prosecuting a child in the adult system. *Hughes*, 653 A.2d at 249 (there needs to be "independent judicial scrutiny into the basis of the alleged offenses" as well as the 'discretion to transfer a case to another forum 'in the interests of justice.'"). In relevant part the Delaware Supreme Court stated:

> Under this scenario, the fate of a child is entirely entrusted -- without impartial judicial review -- to the charging authority, which unilaterally decides whether to charge a child with a felony or a misdemeanor, without a mechanism to challenge its charging decision or transfer the case to the appropriate forum. In essence the statutory amendment has stripped the judiciary of its independent jurisdictional role in the adjudication of children by granting the charging authority unbridled discretion to unilaterally determine which forum has jurisdiction . . By abrogating the amenability processes, the statute has deprived children . . the judicial counterweight which they are constitutionally entitled to receive.

Hughes, 653 A.2d at 249. Because the amendments to the statute were arbitrary and bore "no rational relationship to a legitimate governmental interest," the Delaware Supreme Court struck them down as violating the constitutional guarantees to due process and equal protection of the laws. 653 A.2d at 253.

The Delaware Supreme Court was keenly aware of the importance of judicial oversight into the decision to prosecute a minor as an adult:

> . . .[J]udicial review of the charging decision is essential for those children who are prosecuted as adults. While over-charging of an adult is of little consequence, a groundless felony charge against a child . . .results in a criminal prosecution with its grave attendant consequences. The child is subjected to a public trial in the Superior Court and, if found guilty, convicted of a crime with the attendant stigma of possessing a criminal record. Therefore an unfounded felony charge may arbitrarily deprive a child of the many advantages of adjudication in the Family Court . . .In view of these consequences, it is unconstitutional to grant unfettered discretion to the prosecution, whose unilateral charging decision can effectively establish the jurisdiction over a child. Some meaningful judicial review into

> the nature of the charge is essential to the constitutionality of such a scheme.

Hughes, 653 A.2d at 250. Similarly, D.C. Code § 16-2301(3) is unconstitutional because it allows the Office of the United States Attorney unfettered discretion in the charging decision over sixteen- and seventeen-year-olds, without any meaningful judicial review as to whether a particular child is beyond redemption so as to be properly prosecuted as an adult.

In *State v. Mohi*, *supra*, the Utah Supreme Court struck down Utah's "direct-file" provision as a violation of the state constitution's uniform operation of law provision. The Utah Supreme Court erroneously characterized the District of Columbia "direct file" provision as defining all persons sixteen and older as adults, 901 P.2d at 1000 n. 11, and therefore deemed the District's statute unlike the Utah statute. In perceiving the two statutes as unlike one another, the Utah Supreme Court failed to acknowledge the similarities between the District's "direct file" statute, D.C. Code §16-2301(3), and Utah's provision in that both grant prosecutors "'unguided' discretion." 901 P.2d at 1001. Ellen Marrus, Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 San Diego L. Rev at 1176 (discussing the D.C. Circuit's decision in *Bland* and explaining that "unlike judicial waiver, a juvenile cannot challenge a direct filing in criminal court, and there is no requirement of a hearing before such a decision is made by the prosecutor.")

Although in *Mohi* the Utah Supreme Court declined to address the federal constitutional claim that the Utah statute violated the right to federal dues process of law, and the federal separation of powers claim, 901 P.2d at 1004 n. 21, it did acknowledge the dangers of allowing prosecutors "[s]uch unguided discretion [regarding which juveniles to charge as adults because it] opens the door to abuse without any criteria for review or for ensuring evenhanded decision making." 901 P.2d at 1002. Like the District's statute, the Utah statute did not indicate "what

characteristics of the offender" inform the choice of whether to prosecute a given juvenile as an adult, a decision that the Utah Supreme Court recognized as having "significant consequences for the offender." 901 P.2d at 1003. In language equally applicable to the infirmities in the District's "direct file" provision, the Utah Supreme Court observed that "[t]here [was] no rational connection between the legislature's objective of balancing the needs of children with public protection and its decision to allow prosecutors total discretion in deciding which members of a potential class of juvenile offenders to single-out for adult treatment." 901 P.2d at 1002. At seventeen, and based solely on the charged offense, Mr. W. has been singled out by the United State's Attorney's Office for adult treatment without any consideration of factors relevant to that determination and without any judicial review. Given what is at stake for Mr. W., the Constitution cannot tolerate his prosecution in the Criminal Division under those circumstances.

Conclusion

16 D.C. Code §2301 violates Mr. W.' rights under international law, the Eighth Amendment to the Constitution, and his constitutional rights to substantive and procedural due process and to equal protection of the law. Moreover, by the failure of the Office of the United States Attorney to provide any criteria it claims it uses in determining whether to prosecute 16- and 17-year-olds as adults, together with its failure to disclose any information about the four cases it claims it declined to prosecute between 1999 and 2005, and the limited data that undersigned counsel has been able to garner and then analyze from various sources,[70] this Court

[70]The government's deficient response to Judge Gardner has caused undersigned counsel to cobble together, as best she could, information from the Metropolitan Police Department and Federal Bureau of Investigation, lawyers at the Public Defender Service, and by way of subpoena, the Superior Court for the District of Columbia. In aggregate, albeit not scientifically infallible, this information indicates that the government does not exercise discretion in which juveniles it charges as adults. It is the government that elects to prosecute these 16- and 17-year-olds as adults. As such, it should be incumbent upon the government to keep accurate data upon which the Court and the defense bar can rely, and defense counsel should not be put in the position of having to scramble to compensate for the government's inadequacies.

should find that the government fails to exercise discretion in determining which youth to charge as adults and that this failure constitutes an abuse of discretion warranting the relief sought by Mr. W., *i.e.*, dismissal or, at the very least, a transfer hearing (before this Court or the Family Division) so that a judicial determination can be made that Mr. W. is beyond redemption such that prosecution in the Family Division would be futile and prosecution as an adult for this seventeen-year-old child is warranted. Even if *arguendo* this Court is not prepared to provide that relief at this juncture, at the very least, sanctions, including adverse inferences against the government for its failure to comply with Judge Gardner's December 15, 2006 directives and for its inadequate responses are warranted. Short of some judicial response, the government will succeed in halting a legitimate challenge to whether it exercises any discretion at all, merely by refusing to provide information that could inform the issue. Due to the government's failures to provide information undersigned counsel has been left to scramble, collect data, and conduct inquiries and analyses that the government properly should have provided. The government should not be permitted to be the beneficiary of its own unresponsive conduct.

WHEREFORE, for the foregoing reasons and any others that appear to the Court, L.W., through undersigned counsel, respectfully requests that this Honorable Court dismiss the complaint in this case and transfer his case to the Family Division. In the alternative, Mr. W. asks that the Court hold a hearing pursuant to D.C. Code §16-2307 to determine whether he should be prosecuted in the Criminal Division.

Dated: April ??, 2009

Respectfully submitted,

Santha Sonenberg (D.C. Bar No. 376-188)
Public Defender Service
On Behalf of L.W.
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 824-2308

CERTIFICATE OF SERVICE

This is to certify that, on this ____ day of April, 2009, a copy of the foregoing pleading has been served by hand upon M.G., Office of the United States Attorney, 555 Fourth Street, N.W., Washington, D.C. 20530.

Santha Sonenberg

United States v. XXX
Criminal No.

Exhibits Appended to Motion To Dismiss

Exhibit	Description of Document
Appendix	Analysis of cases and outcomes
A	Declaration of Professor Ruben Gur, Professor of Psychiatry, University of Pennsylvania School of Medicine
B	Declaration of Professor Stephen Schnably, Professor of Law, University of Miami School of Law
C	Table of Sixteen- and seventeen-year-Olds With No Prior Juvenile Adjudications or Adult Convictions Charged As Adults In The Criminal Division (and accompanying declarations)
D	Age of Homicide Offenders in the District of Columbia (1980-2004)
E	MPD's Murder Analysis: A Study of Homicide In The District of Columbia (2001)
F	Memorandum Regarding Sixteen- and Seventeen-Year Olds Charged With Murder In The Family Division (2/12/07)
G	MPD 2006 Arrest Adult and Juvenile Statistics By Offense Category

Year	Case Number	Name	DOB	Offense Date	Client's Age	Offense Charged	PDS/Non-PDS	Facts relevant to D.C. Code §16-2307(e) Determination
1998 = 14 cases								
	F???-98	C., O.	1/??/81	1/13/98	16 y/o	M-2	PDS	Government agreed that the shooting was an accident; client plead guilty to manslaughter
	F???-98	A., M.	3/??/80	1/26/97	16 y/o	M-2	CJA: Antonini Jones	Elements of self-defense; plea to manslaughter while armed (8-24 year sentence); stabbing with an ice-pick at Wilson High School
	F??? -98	H., M.	8/??/79	8/27/96	16 y/o	M-1	PDS	Acquitted; client was an orphan and had been in the neglect system
	F???-98	J., M.	9/??/80	7/8/97	17 y/o	Fel. M.	CJA: John Carney	
	F???-98	E., X.	12/??/80	6/23/97	16 y/o	M-1	CJA- A. Matthews	Extraordinarily bright youth with serious family problems; case resulted in a plea to manslaughter, PFCV, and ADW and a concurrent sentence under the Youth Rehabilitation Act
	~~F??? 98~~	~~C., J.~~	~~11/??/78~~	~~9/27/94~~	~~15 y/o~~	~~M-1~~	~~CJA: Nancy Allen~~	~~Stabbing; plea to aggravated assault~~
	F???-98	B., S.	9/??/81	8/1/98	16 y/o	M-2	CJA: Paul Kionaga	Plea to involuntary manslaughter with Youth Rehabilitation Act sentence of four years ESS all but time served; striking and beating of three-year-old child.
	F???-98	P., D.	5/??/82	8/12/98	16 y/o	Fel. M.	PDS: McAroy-Gray	Plea to robbery where accomplice shot complainant during a robbery
	F???-98	W., J.	9/??/80	1/9/97	16 y/o	M-1	CJA: Archie Nichols	Client was co-defendant with his mother in the homicide prosecution for the death of his step-father; plea to second-degree murder while armed => sentence of five years probation supervision to occur in the Mental Health Unit
	F???-98	W., J.	1/??/82	9/16/98	16 y/o	M-1	PDS	First arrest as adult or juvenile; client was

								one of 18 children raised by grandmother; and was in the ninth grade at the time of the offense; plea to manslaughter
	F??? -98	D., G.	1/??/82	9/16/98	16 y/o	M-1	CJA: Michele Roberts	
	F??? -98	W., M.	2/??/81	1/2/98	16 y/o	M-1	PDS: Horton	Case dismissed on 4/16/99 after client had been held without bond since 9/30/98
	F???-98	A., P.	8/??/80	8/4/97	17 y/o	M-1	CJA: Cynthia Katkish	
	F???-98	R., A.	3/??/80	10/5/97	17 y/o	M-1	PDS	Plea to second-degree murder while armed; client had auditory hallucinations and mental health issues; no prior juvenile adjudications
	F???-98	L., S.	1/??/81	12/10/98	17 y/o	Fel. M.	PDS	Client was look-out, not principal; client was cognitively impaired. Client pleaded guilty to manslaughter and after a Rule 35 motion to reduce was granted, he was placed on probation after having served a number of years in federal prison.

Year	Case Number	Name	DOB	Offense Date	Client's Age	Offense Charged	PDS/Non-PDS	Facts relevant to D.C. Code §16-2307(e) Determination
1999 = 11 cases								
	F???-99	C., E.	5??/81	7/31/98	17 y/o	M-1	CJA: Thomas Heslep	Guilty plea to robbery and accessory after the fact to murder => Youth Act Probation sentence => revocation ("time served")
	F???-99	L., F.	7/?/74	8/30/91	17 y/o	M-1	PDS	Plea to voluntary manslaughter (offense 1991); government allocated for sentence of 3-9 years to run concurrent with another sentence client already serving; aspect of self-defense to the case
	F???-99	W., J.	5/??/81	10/30/98	17 y/o	M-1	PDS	Client had no juvenile adjudications; client had borderline intellectual functioning; client was not the shooter; PSI reported that client had "not developed the maturity to make life decisions"
	F???-99	M., A.	11/??/80	8/10/97	16 y/o	M-1	PDS	
	F???-99	K., R.	1/??/82	6/21/99	17 y/o	M-2	CJA: Bernard Grimm	
	~~F??? 99~~	~~M., S.~~	~~11/??/81~~	~~9/10/97~~	~~15 y/o~~	~~M-1~~	~~CJA: Rochon, Mark~~	~~Must have had a transfer hearing under D.C. Code §16-2307(e) since he was fifteen at the time of the offense~~
	F???-99	W., O.	5/??/83	6/1/99	16 y/o	M-1	CJA: Robinson, Kenny	
	F???-99	M-P, C.	11/??/82	10/18/99	16 y/o	M-2	PDS	First-time offender; emigrated from Honduras; illiterate; elements of self-defense; plea to manlsaughter => sentence under Youth Rehabilitation Act
	F???-99	P., W.	1/??/82	6/1/99	17 y/o	M-1	CJA: John Harvey	
	F???-99	N., W.	11/??/82	9/12/99	16 y/o	M-1	CJA: Paul Signet	

	F????-99	P., D.	6/??/82	10/31/99	17 y/o	M-1	CJA:	
	F???-99	B., J.J.	12/??/82	12/13/99	17 y/o	Fel. M.	PDS	No juvenile adjudications; client suffered abuse as a child; client was not the trigger-person
	~~F??? 99~~	~~J., D.~~	~~6/??/81~~	~~7/4/96~~	~~15 y/o~~	~~M-1~~	~~PDS~~	~~Had a transfer hearing under D.C. Code §16-2307(e) since he was fifteen at the time of the offense~~

Year	Case Number	Name	DOB	Offense Date	Client's Age	Offense Charged	PDS/Non-PDS	Facts relevant to D.C. Code §16-2307(e) Determination
2000 = 2 cases								
	F???-00	M-C., J.	10??4/83	8/1/00	16 y/o	M-1	PDS	Client was alleged to have been look-out, not trigger-person
	F-???-00	R., S.			17 y/o		PDS	Mother of three; accidental gun shooting => conviction for manslaughter and Youth Act sentence

Year	Case Number	Name	DOB	Offense Date	Client's Age	Offense Charged	PDS/Non-PDS	Facts relevant to D.C. Code §16-2307(e) Determination
2001 = 5 cases								
	F???-01	B., G. A.	9/??/74	8/4/91	16 y/o	M-1	CJA	
	F??-01	C., D.	5/??/84	3/25/01	16 y/o	M-2	CJA: Ponds, Billy	
	F???-01	H., J. D.	2/??/83	9/30/00	17 y/o	M-1	CJA: Daum, Charles	
	F???-01	P., T.	5/??/84	6/29/01	17 y/o	M-1	PDS	
	F???-01	C., P.	7/??/84	11/1/01	17 y/o	M-1	PDS	

Year	Case Number	Name	DOB	Offense Date	Client's Age	Offense Charged	PDS/Non-PDS	Facts relevant to D.C. Code §16-2307(e) Determination
2002 = 7 cases								
	~~F??? 02~~	~~J., D.~~	~~6/??/81~~	~~6/9/97~~	~~15 y/o~~	~~M-1~~	~~PDS~~	~~Had a transfer hearing under D.C. Code §16-2307(e) since he was fifteen at the time of the offense~~
	F???-02	D., K. N.	1/?/84	12/8/00	16 y/o	M-1	CJA: Wham, Douglas	
	F???-02	I., D. J.	6/??/83	12/8/00	17 y/o	M-1	CJA: Bernard, Joe	
	F???-02	A., D/	3/??/85	5/12/02	17 y/o	M-1	PDS	No juvenile record; shot mother of his baby; history of migraine headaches requiring hospitalizations; hit by a car;
	~~F??? 02~~	~~M., T. L.~~	~~11/??/86~~	~~6/7/02~~	~~15 y/o~~	~~M-1~~	~~CJA: Wood, Douglas~~	~~Had a transfer hearing under D.C. Code §16-2307(e) since he was fifteen at the time of the offense~~
	F???-02	S., W.	6/??/82	12/12/99	17 y/o	M-1	CJA: Wicks, Jennifer	
	F???-02	L., T.	4/??/85	10/16/02	17 y/o	M-2	CJA: Wicks, Jennifer	
	F????-02	V., M.	9/??/85	7/11/02	16 y/o	M-2	CJA: Nichols, Archie	
	F???-02	Y., M. J.	9/??/85	12/2/02	17 y/o	M-1	PDS	Never arrested before; plea to second-degree murder; PSI recommends juvenile facility; mitigating circumstances based upon prior history involving decedent's and complainant's treatment of client; seriously dysfunctional family

Year	Case Number	Name	DOB	Offense Date	Client's Age	Offense Charged	PDS/Non-PDS	Facts relevant to D.C. Code §16-2307(e) Determination
2003 = 7 cases								
	F???-03	P., A.	4/??/86	1/28/03	16 y/o	M-1	PDS	Client was not trigger-person; severe mental health history and history of having suffered child abuse
	F???-03	F., D.	3/??/85	1/11/02	16 y/o	M-2	CJA: Ahmed, Atiq	
	F???-03	D., J. E.	1/??/86	4/27/03	17 y/o	M-2	CJA: Ahmed, Atiq	
	F???-03	A., P.	4/?/86	6/1/01	15 y/o	M-1	CJA: Barney, Bradford	
	F???-03	J., R.	6/??/86	8/8/03	17 y/o	M-1	PDS	Acquitted; special education student.
	F???-03	V., J. N.	12/??/86	11/5/03	16 y/o	M-2	CJA: Weekes, Anthony	
	F???-03	Y., R.	3/??/78	11/11/95	17 y/o	M-1	CJA:	

Year	Case Number	Name	DOB	Offense Date	Client's Age	Offense Charged	PDS/Non-PDS	Facts relevant to D.C. Code §16-2307(e) Determination
2004 = 7 cases								
	F???-04	M., J.	12/??/86	3/22/04	17 y/o	M-1	PDS	Client exposed to drugs and alcohol *in utero*, had fetal alcohol syndrome disorder and symptoms of post-traumatic stress disorder; client had been victim of a shooting.
	F???-04	M., C.	10/??/87	4/25/04	16 y/o	M-1	PDS	No prior arrests (adult or juvenile) & client acquitted on alibi defense known to MPD and government from before client's arrest
	F???-04	Y., J.	10/??/83	2/1/00	16 y/o	Fel. M.	PDS	
	F????-04	L., A.	1/?/88	7/2/04	16 y/o	M-2	CJA: Williams, James	
	F???-04	M., P. D.	1/??/88	8/27/04	16 y/o	M-1	PDS	Guilty of second-degree murder; client was with two other people previously targeted by the decedent; client did not use his weapon
	F???-04	G., D.	3/??/87	9/7/04	17 y/o	M-2	CJA: Mosley, Kevin	
	F???-04	E., S. E.	5/??/86	8/4/03	17 y/o	M-1	PDS	Case dismissed prior to indictment

Year	Case Number	Name	DOB	Offense Date	Client's Age	Offense Charged	PDS/Non-PDS	Facts relevant to D.C. Code §16-2307(e) Determination
2005 = 2 cases								
	F???-05	B., K.	3/??/88	6/14/05	17 y/o	M-1	PDS	
	F???-05	E., S.	8/??/88	4/4/05	16 y/o	M-1	PDS	Client was shot at although he also fired shots. Case dismissed

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2007 ?????**
v.	:	**Hon. N. K.**
	:	**Hearing: August ??, 2007**
XXX YYY	:	

AFFIDAVIT

I, Ruben C. Gur, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

1. Professional and Educational Background

I am a Professor of Psychiatry in the Department of Psychiatry at the University of Pennsylvania School of Medicine and I have secondary appointments in the Departments of Radiology and Neurology. I am also the Director of the Brain Behavior Laboratory at the School of Medicine at the University of Pennsylvania. I have my masters (1971) and doctoral (1973) degrees from Michigan State University and my undergraduate degree (1970) from Hebrew University of Jerusalem. I did a post-doctral fellowship at Stanford University in 1974.

2. The Biology of Brain Development

The rate at which the human brain matures has been of considerable interest to neuroscientists, and knowledge of when different brain regions mature in human development has profound implications for understanding behavioral development.

Although the brain and its structure become well differentiated during fetal development, there is overwhelming evidence that much of the maturational process occurs after birth. Indeed, projections from early pioneering work on donated brain tissue have indicated that some brain regions do not reach maturity in humans until adulthood. These projections have been confirmed by more recent neuroimaging studies. Brain-scan techniques have demonstrated conclusively that the phenomena observed by mental-health professionals in persons under 18, which would render them less morally blameworthy for offenses, have a scientific grounding in neural substrates.

The main index of maturation, which is the process called *myelination*,[1] is not complete until some time in the beginning of the third decade of life (probably at around ages 20-22). Other maturational processes, such as the increase and subsequent elimination ("pruning") in cell number and connectivity, may be completed by late adolescence, perhaps by ages 15-17. The significance of these observations for understanding behavioral development cannot be underestimated.

Investigators at UCLA's brain imaging center concluded that brain areas in the cerebral cortex, responsible for higher-order integration, mature only after lower-order somatosensory and visual cortices are developed. These cortical regions, particularly those in prefrontal areas, are last to mature and are involved in behavioral facets germane to many aspects of criminal culpability. Perhaps most relevant is the involvement of

[1]Myelination involves the creation fatty tissue surrounding nerve fibers, known as myelin. The creation of myelin is important for assuring efficient transmission of neuronal signals; myelin surrounds the nerve fibers that carry information across large distances very much in the same way that rubber is used for insulating cables designed to conduct electricity across distance.

these brain regions in the control of aggression and other impulses, the process of planning for long-range goals, organization of sequential behavior, the process of abstraction and mental flexibility, and aspects of memory including "working memory." If the neural substrates of these behaviors have not reached maturity before adulthood, it is unreasonable to expect the behaviors themselves to reflect mature thought processes.

3. The Importance Of Developmental Brain Biology To Prosecuting Minors As Adults

The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable. Therefore, from the perspective of neural development, someone under 20 should be considered to have an underdeveloped brain. Additionally, since brain development in the relevant areas goes in phases that vary in rate and is usually not complete before the early to mid-20s, there is no way to state with any scientific reliability that an individual 16-year-old has a fully matured brain, no matter how many otherwise accurate tests and measures might be applied to him at the time of his trial. This is similar to other physical characteristics such as height. While we know the age at which the average adult reaches his or her maximal height, predictions for individuals are not easy to make. Thus, although 18 is an arbitrary cutoff, given the ongoing development of the brain in most individuals, it must be preferred over 16 to assure that only the most culpable are prosecuted as adults. Indeed, age 21 or 22 would be closer to the "biological" age of maturity.

The foregoing discoveries have profound implications for understanding behavioral development. The cortical regions, particularly those in prefrontal areas, are involved in behavioral facets germane to many aspect of criminal culpability. Perhaps most relevant is the involvement of these brain regions in the control of aggression and other impulses, the process of planning for long-range goals, organization of sequential behavior, the process of abstraction and mental flexibility, and aspects of memory including "working memory." If the neural substrates of these behaviors have not reached maturity before adulthood, it is unreasonable to expect the behaviors themselves to reflect mature thought processes.

Dated: August 28, 2007

_____
Ruben C. Gur

Signed and sworn to before me this _____ day of August 2007.

_____
Notary Public

My Commission Expires:

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2007 ???**
v.	:	**Hon. N. K.**
	:	**Hearing: August ??, 2007**
XXX YYY	:	

DECLARATION

I, Stephen J. Schnably, a member of the bar of the District of Columbia since 1981, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

1. Professional and Educational Background

I am a Professor of Law at the University of Miami School of Law, the faculty of which I joined in 1988, and where I have also been Associate Dean. My area of specialty is international human rights law and international law more generally. I am a 1976 graduate of Harvard College, and a 1981 graduate of Harvard Law School from which I graduated *magna cum laude*, and where I was an editor of the Harvard Law Review. My other legal experience includes a two-year clerkship with the Honorable Leonard I. Garth, United States Circuit Judge on the United States Court of Appeals for the Third Circuit, and thereafter, fours years as an associate with the then-law firm of Wilmer, Cutler, and Pickering in the District of Columbia (now known as Wilmer, Cuter, Pickering, Hale and Dorr, LLP.). In addition to being a member of the bar of the District of Columbia, I am also admitted to the practice of law before the United States Courts of Appeals for the Third, Eleventh and

Federal Circuits, the United States District Court for the District of Columbia, and the Court of Federal Claims.

2. I have reviewed the pleadings filed on behalf of Hernan Melendez, especially focusing on pages 8-16 of the May 31, 2007, Reply To Government's Opposition To Motion To Dismiss Complaint and Transfer Case To The Family Division Or In The Alternative For Transfer Hearing Pursuant to D.C. Code §16-2307 and Supplemental Points and Authorities, and the government's July 13, 2007, Response To International Law Arguments Raised In Defendant's Reply In Support of Motion To Dismiss Complaint On In The Alternative For A Transfer Hearing.

3. **Sources of International Law and The Effect of International Law on Domestic Courts**

In *The Paquete Habana*, 175 U.S. 677, 700 (1900), the United States Supreme Court held that international law is a part of United States law and that courts within the United States were charged with ascertaining and administering international law to the extent that rights dependent upon international law are at issue. Under Article VI cl. 2 of the Constitution, international law is part of federal law and is supreme over any inconsistent state law. U.S. Constitution art. VI cl. 2. *See* Restatement § 111(1) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States."). This principle encompasses customary international law as well; *id.* § 702, comment c ("The customary law of human rights is part of the law of the United States to be applied as such by State as well as federal courts."), and peremptory norms. U.S. treaty law, customary international law, and peremptory norms prevail over prior inconsistent federal statutes,

and over *any* inconsistent state statute or constitutional provision. *See* Restatement § 111, comment d.

There are three basic sources of international law obligations on the U.S. and any other state in the international system. Any given norm of international law may be embodied in a treaty; in customary international law; in a peremptory norm; or in any two or all three of these sources. All three types constitute binding sources of obligations on states.

The first source of international law obligations is treaties. A treaty becomes binding on a state when it ratifies or accedes to it in accordance with the terms of the treaty. Vienna Convention on the Law of Treaties, Pt. II.[1] A state that is party to a treaty is obligated to perform the requirements of the treaty "in good faith." Vienna Convention, Art. 26. Although a state may take a reservation to particular obligations in a treaty, as long as the treaty permits it and the reservation is not incompatible with the object and purpose of the treaty, Vienna Convention, Art. 19, the only effect of a valid reservation is to exempt a state party from the specific provision(s) as to which the reservation was taken.

Treaties must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention, Art. 31. Further, although when they are applying treaties, domestic courts may need to take into account domestic rules about the role of

---

[1]The Vienna Convention codifies the customary international law of treaties, and has generally been recognized as such by the United States. Restatement (Third) of the Foreign Relations Law of the United States Pt. III, Introductory Note, at 145 (1986) [hereinafter "Restatement"]. See S. Exec. Doc. L., 92d Cong., 1st Sess. (1971).

international law, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Vienna Convention, Art. 27.

The second source of international law obligations is customary international law, which all states, including the U.S., are bound to observe. Customary international law results from a "consistent practice of states followed by them from a sense of legal obligation." Restatement §§ 102(1)(a), 102(2). *See* Restatement § 701 ("The United States is bound by the international customary law of human rights.").

The third source of binding international legal obligations for all states, including the U.S., is *jus cogens* (peremptory norms). A peremptory norm "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Vienna Convention, Art. 53. States are bound by peremptory norms regardless of whether they consent to them.

The mandate to construe domestic law in a way that is consistent with the United States' international law obligations essentially stems from the fact that no state may justify non-compliance with international law by pointing to its own domestic law. Judicial decisions that construe domestic law in a way that is not consistent with international law thus place the U.S. in a position of nonconformity with its binding legal obligations as a member of the international community. A court should not conclude that either the framers or the legislature – state or federal – intended to put the U.S. in such a position unless the construction is absolutely unavoidable.

4. The Directives Found In International Law Regarding The Treatment of Youth

International law imposes two fundamental obligations on states with regard to juvenile justice. The first is the obligation to act in the best interests of the child in every case. The second is the obligation to treat all individuals, including juveniles charged with a crime, with respect for their dignity and humanity.

International law requires states to provide children with all measures of protection required by their status as juveniles and further requires that all actions regarding children take into account the best interests of the child. These obligations are evidenced in a wide range of multilateral human rights treaties to which the vast majority of states are party, including two that directly place obligations on the U.S. One such treaty is the International Covenant on Civil and Political Rights, and another is the Convention on the Rights of the Child. Other conventions, such as the American Convention on Human Rights, also require that children receive special protection appropriate to their age. For example, that Convention requires that "minors . . subject to criminal prosecution . . .be . . brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors." American Convention on Human Rights, Art. 5(5).

Customary law also requires that the child's best interests be taken into account as evidenced by the consistent inclusion of the child's "best interests" as a critical component in major global and regional human rights treaties, ratified by the vast majority of states, thus recognizing its binding nature as customary law. For example the Commentary to Rule 5 of the United Nations Standard Minimum Rules for the

Administration of Juvenile Justice ("Beijing Rules"), adopted by General Assembly resolution 40/33 of 29 November 1985, states that "The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances." This clearly contemplates an individualized determination on a case-by-case basis regarding criminal treatment of youth.

5. The Meaning Of International Law Directives In The Context of Prosecutorial "Direct-File" Provisions

Permitting a prosecutor's determination to charge a given youth as an adult, thereby depriving him of all judicial measures of consideration for his youthful status denies him his humanity and violates the obligation to act in the youth's interests.

First, treating accused juveniles as adults without any possibility of evaluation by the court or a jury of the juvenile's particular circumstances is inconsistent with the obligation to treat individual juveniles with respect for their dignity and humanity – that is, on an individualized basis, taking their best interests into account.

Article 37(d) of the CRC states that "*[e]very* child deprived of his or her liberty shall have . . . the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action" (emphasis added). Blanket treatment of juvenile offenders in a particular way detrimental to them, based exclusively on unreviewable prosecutorial discretion, is inconsistent with the obligation articulated in the Convention on the Rights of the Child to take their best interests into account in *every* case. A blanket deprivation of judicial review of whether a given child warrants prosecution as an adult or a blanket deprivation of consideration by a judge or a jury of the juvenile's circumstances is also

inconsistent with the requirements in the International Covenant on Civil and Political Rights that the procedure for each juvenile "be such as will taken account of their age and the desirability of promoting their rehabilitation." Precluding consideration by the court of the individual juvenile's maturity, vulnerability to pressure, background, and the like is contrary to the best interests of the child, and so degrades him or her.

Dated: August 28, 2007

_____
Stephen J. Schnably

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct.

Signed and sworn to before me this _____ day of August 2007.

_____
Notary Public

My Commission Expires:

Table of Sixteen- and Seventeen-Year Olds With No Prior Juvenile Adjudications or Adult Convictions Charged As Adults In The Criminal Division

Name	Date of Birth	Age At Time Charged As Adult	Case Number	Charge
Brevard, Samuel	2/4/88	16	2004 FEL 5910	Armed Robbery
Brewster, Kenneth	3/23/88	17	2005 FEL 3352	Murder One While Armed
Coleman, Carlton	12/28/87	16	2004 FEL 5908	Armed Robbery
Gilham, Jonas	11/12/86	16	2003 FEL 2092	First degree Sexual Abuse While Armed
Gonzalez, Silvia	5/14/89	16	2006 CF3 34756	Armed Robbery
Gray, Joseph	10/30/89	16	2006 CF3 11189	Armed Robbery
Jackson, Marcel	2/10/87	17	2004 FEL 7685	Armed Robbery
Johnson, Arthur	7/29/89	16	2005 FEL 6070	Armed Robbery
Lee, Darnell	10/12/88	16	2005 FEL 2913	Armed Robbery
Lewis, Davon	7/7/88	17	2006 CF3 8849	Armed Robbery
Miller, Tyree	9/4/88	17	2006 CF3 8126	Assault With Intent to Murder
Moore, Michael	12/6/88	17	2006 CF3 15176	Armed Robbery
Morales-Portillo, Carlos	10/19/82	16	1999 FEL 7763	Second-Degree Murder
McCoy, Cortez	10/3/87	16	2004 FEL 2721	First-Degree Murder
Pittman, Avon	6/2/89	17	2006 CF1 26917	Attempted First Degree Sexual Abuse While Armed
Robinson, Julius	9/18/87	17	2005 FEL 2561	Armed Robbery
Seegars, John	5/19/89	17	2006 CF3 28419	Armed Robbery
Shaheed, Shakur	1/30/90	16	2006 CF3 19261	Armed Robbery
Stoutamire, Terrance	11/30/88	17	2004 FEL 7514	Armed Robbery

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Santha Sonenberg, a member of the bar of the District of Columbia since 1983 (D.C Bar No. 376-188), pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

I have represented the following clients who were sixteen or seventeen years old at the time they were charged as adults in the Criminal Division and they did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge
Carlos Morales-Portillo	10/19/82	16	1999 FEL7763	Murder Two
Cortez McCoy	10/3/87	16	2004 FEL 2721	Murder One
Joseph Gray	10/30/89	16	2006 CF3 11189	Armed Robbery

Dated: February 7, 2007

Santha Sonenberg (D.C. Bar No. 376-188)

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Eric Klein, a member of the bar of the District of Columbia since 2000, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

I have represented the following client who was sixteen or seventeen years old at the time they were charged as adults in the Criminal Division and they did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge
Silvia Gonzalez	5/14/89	16	2006 CF3 34756	Armed Robbery

Dated: February 7, 2007

_____
Eric Klein

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Elizabeth Mullin, a member of the bar of the District of Columbia since 2003, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

I have represented the following client who was sixteen or seventeen years old at the time they were charged as adults in the Criminal Division and they did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge
John Seegars	5/19/89	17	2006 CF3 28419	Armed Robbery

Dated: February 7, 2007

_____
Elizabeth Mullin

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Melissa Sandoval, a member of the bar of the District of Columbia since 2002, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

I have represented the following client who was sixteen or seventeen years old at the time they were charged as adults in the Criminal Division and they did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge
Terrance Stoutamire	11/30/88	17	2004 FEL 7514	Armed Robbery

Dated: February 7, 2007

Melissa Sandoval

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Amit Mehta, a member of the bar of the District of Columbia since 2000, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

I have represented the following clients who were seventeen years old at the time they were charged as adults in the Criminal Division and to the best of my recollection they did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge
Julius Robinson	9/18/87	17	2005 FEL 2561	Armed Robbery
Davon Lewis	7/7/88	17	2006 CF3 8849	Armed Robbery

Dated: February 7, 2007

_____
Amit Mehta

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Heather Pinckney, a member of the bar of the District of Columbia since 2000, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

I have represented the following client who was sixteen or seventeen years old at the time they were charged as adults in the Criminal Division and they did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge
Samuel Brevard	2/4/88	16	2004 FEL 5910	Armed Robbery

Dated: February 7, 2007

_____
Heather Pinckney

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Seema Gajwani, a member of the bar of the District of Columbia since 2001, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

I have represented the following client who was sixteen or seventeen years old at the time they were charged as adults in the Criminal Division and they did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge
Arthur Johnson	7/29/89	16	2005 FEL 6070	Armed Robbery

Dated: February 7, 2007

Seema Gajwani

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Lawrence Kupers, a member of the bar of the District of Columbia since 2005, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

I have represented the following clients who were seventeen years old at the time they were charged as adults in the Criminal Division and they did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge
Marcel Jackson	2/10/87	17	2004 FEL 7685	Armed Robbery
Michael Moore	12/6/88	17	2006 CF3 15176	Armed Robbery

Dated: February 7, 2007

_____
Lawrence Kupers

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Gladys Weatherspoon, a member of the bar of the District of Columbia since 1995, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

I have represented the following client who was sixteen or seventeen years old at the time they were charged as adults in the Criminal Division and they did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge
Kenneth Brewster	3/23/88	17	2005 FEL 3352	Murder One While Armed

Dated: February 7, 2007

Gladys Weatherspoon

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Maribeth Raffinan, a member of the bar of the District of Columbia since 2000, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

I have represented the following client who was sixteen or seventeen years old at the time they were charged as adults in the Criminal Division and they did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge

Dated: February 7, 2007

_____
Maribeth Raffinan

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Jason Tulley, a member of the bar of the District of Columbia since 2004, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

I have represented the following client who was seventeen years old at the time he was charged as an adult in the Criminal Division and he did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge
Avon Pittman	6/2/89	17	2006 CF1 26917	Attempted First Degree Sexual Abuse While Armed

Dated: February 7, 2007

_____
Jason Tulley

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Katerina Semyonova, a member of the bar of the District of Columbia since 2005, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

Together with Anthony Matthews, a member of the bar of the District of Columbia since 1991, I represent the following client who was seventeen years old at the time he was charged as an adult in the Criminal Division and he did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge
Tyree Miller	9/4/88	17	2006 CF3 8126	Assault With Intent To Murder While Armed

Dated: February 7, 2007

Katerina Semyonova

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Madalyn Harvey, a member of the bar of the District of Columbia since 2000, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

I have represented the following client who was sixteen years old at the time he was charged as an adult in the Criminal Division and he did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge
Darrell Lee	10/12/88	16	2005 FEL 4913	Armed Robbery

Dated: February 7, 2007

_____
Madalyn Harvey

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2006 CF1 17652**
v.	:	**Hon. Wendell Gardner**
	:	**Hearing: February 9, 2007**
ALISHIA CARRINGTON	:	

DECLARATION

I, Samantha Buckingham, a member of the bar of the District of Columbia since 2004, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

I have represented the following client who was sixteen years old at the time he was charged as an adult in the Criminal Division and he did not have prior juvenile adjudications or prior adult convictions:

Name	Date of Birth	Age At Time Charged As an Adult	Case Number	Charge
Shakur Shaheed	1/30/90	16	2006 CF3 19261	Armed Robbery

Dated: February 7, 2007

Samantha Buckingham

Pursuant to 28 U.S.C. §1746, by my signature above, I declare under penalties of perjury that the foregoing is true and correct.

Easy Access to the FBI's Supplementary Homicide Reports: 1980-2004

Age of Known Murder Offenders in District of Columbia

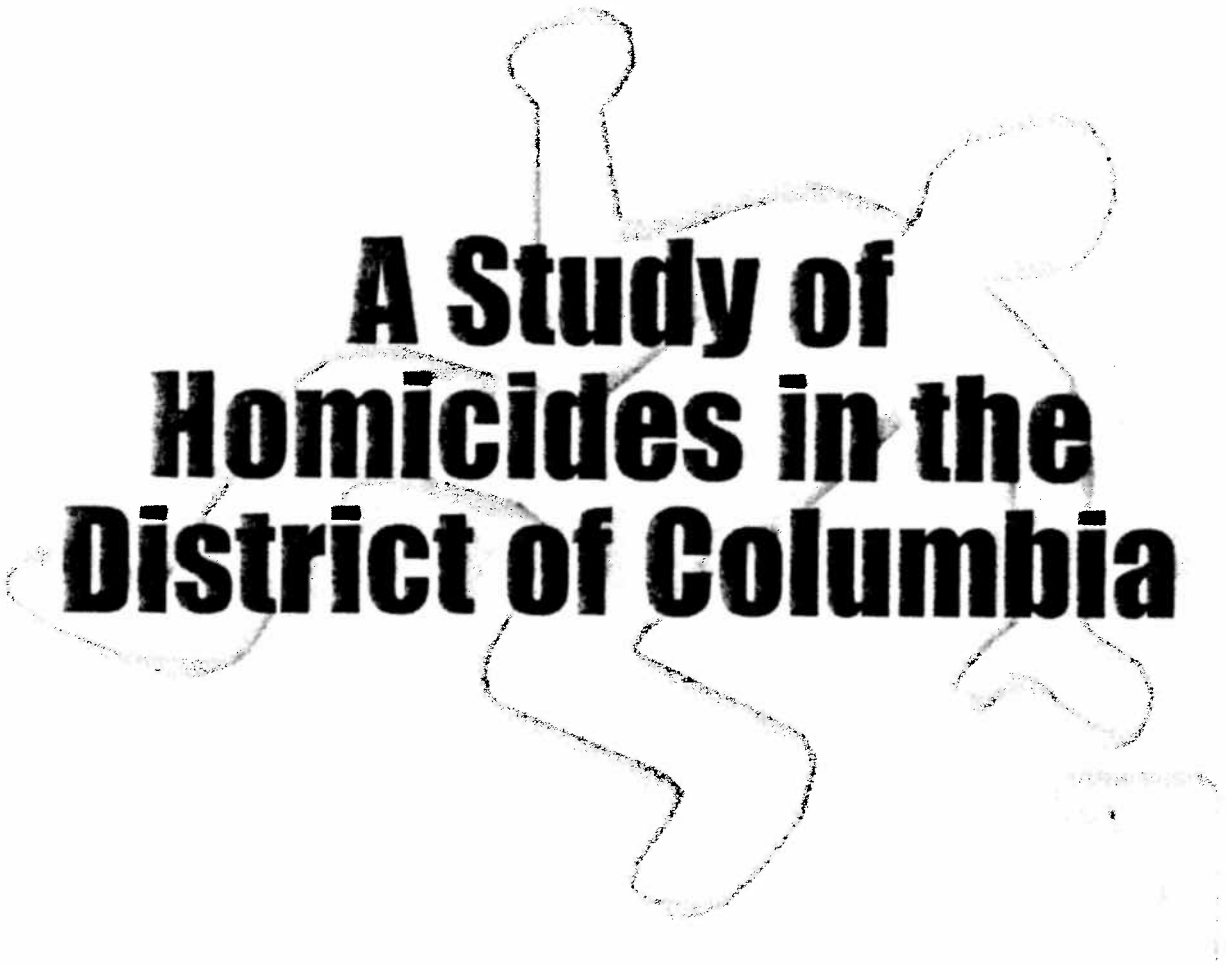
Known Offenders	0 to 11	12 to 17	18 to 24	25 to 49	50 and older	Unknown	Total
1980	0	11	28	74	10	0	124
1981	0	2	19	49	15	0	85
1982	0	4	20	45	8	4	81
1983	0	1	12	28	6	36	83
1984	0	1	18	41	6	18	84
1985	0	2	17	19	5	17	60
1986	0	4	11	24	8	30	77
1987	0	4	17	24	5	20	70
1988	0	1	11	21	2	19	54
1989	0	2	3	1	1	27	34
1990	0	0	1	1	0	26	28
1991	0	36	83	47	4	12	182
1992	0	24	45	41	6	2	118
1993	0	25	41	41	1	2	111
1994	0	2	5	5	2	22	36
1995	0	25	54	32	1	4	116
1996	N/A	N/A	N/A	N/A	N/A	N/A	N/A
1997	0	21	69	40	4	9	143
1998	N/A	N/A	N/A	N/A	N/A	N/A	N/A
1999	N/A	N/A	N/A	N/A	N/A	N/A	N/A
2000	N/A	N/A	N/A	N/A	N/A	N/A	N/A
2001	N/A	N/A	N/A	N/A	N/A	N/A	N/A
2002	N/A	N/A	N/A	N/A	N/A	N/A	N/A
2003	N/A	N/A	N/A	N/A	N/A	N/A	N/A
2004	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Total	N/A	N/A	N/A	N/A	N/A	N/A	N/A

N/A: data were either not reported or incomplete. As such, column totals are not presented.

Suggested citation: Snyder, H., Finnegan, T., and Kang, W. (2006). "Easy Access to the FBI's Supplementary Homicide Reports: 1980 - 2004" Online. Available: http://ojjdp.ncjrs.gov/ojstatbb/ezashr/

Data source: Federal Bureau of Investigation. *Supplementary Homicide Reports* 1980-2004 [machine-readable data files].

Murder Analysis



A Study of Homicides in the District of Columbia

Metropolitan Police Department
District of Columbia

October 2001

Ages of Victims

	Frequency	Percent
14 years or younger	25	3.4%
15 to 19 years old	140	18.8%
20 to 24 years old	166	22.3%
25 to 34 years old	218	29.3%
35 to 44 years old	109	14.7%
45 years or older	86	11.6%
Total	**744**	**100.1%**

DC Population (2000 Census)

	Number	Percent
14 years or younger	97,939	17.1%
15 to 19 years old	37,867	6.6%
20 to 24 years old	51,823	9.1%
25 to 34 years old	101,762	17.8%
35 to 44 years old	87,677	15.3%
45 years or older	194,991	34.1%
Total	**572,059**	**100.0%**

Ages and Gender of Victims

	Male	Female	Total
10 years or under	6	15	21
11 to 15 years old	9	1	10
16 to 17 years old	33	7	40
18 to 19 years old	89	5	94
20 to 24 years old	155	11	166
25 to 29 years old	123	12	135
30 to 34 years old	77	6	83
35 to 39 years old	60	8	68
40 to 49 years old	55	9	64
50 to 59 years old	29	5	34
60 years or older	16	13	29
Total	**652**	**92**	**744**

Race/Ethnicity of Victims

	Number	Percent
African-American	685	92.1%
Hispanic/Latino	24	3.2%
White	24	3.2%
Asian	10	1.3%
American Indian	1	0.1%
Total	**744**	**100.0%**

Ages of Suspects

	Number	Percent
10 to 15 years old	10	2.7%
16 to 17 years old	27	7.4%
18 to 19 years old	66	18.1%
20 to 24 years old	124	34.0%
25 to 29 years old	51	14.0%
30 to 34 years old	35	9.6%
35 to 39 years old	18	4.9%
40 to 49 years old	19	5.2%
50 to 59 years old	9	2.5%
60 years or older	6	1.6%
Total	**365**	**100.0%**

Note: *Age unknown in 2 arrests.*

Gender of Suspects

	Number	Percent
Males	344	93.7%
Females	23	6.2%
Total	**367**	**100.0%**

Race/Ethnicity of Suspects

	Number	Percent
African American	345	94.0%
Hispanic	16	4.4%
White	5	1.4%
Asian	1	0.3%
Total	**367**	**100.1%**

This Homicide Report was prepared by the Metropolitan Police Department's Office of Quality Assuarance.
For additional copies call 202-727-2663.

Anthony A. Williams
Mayor, District of Columbia

www.mpdc.dc.gov

Charles H. Ramsey
Chief of Police

DISTRICT OF COLUMBIA COURTS
Information Technology Division
500 Indiana Ave., NW
Washington, D.C. 20001-2131

ANNE WICKS
Chief Executive Officer

YUAN BURNS
Acting Director of IT

Feb. 12, 2007

Memorandum

To: **Duane Delaney, Clerk of the Court**
Superior Court of the District of Columbia

From: **Yuan Burns, Acting Director**
Information and Technology Division

Subject: **Documents Requested by Subpoena**

Per your request, Ms. Debbie Grafton, the IT programmer has provided me the following information in responding to item 1 in the subpoena for case no 2006 CF1 17652. Since it was not specified in the request whether attempted murder was needed, Ms. Grafton has included those numbers separately.

There are total of eight (8) of sixteen- and seventeen-year-olds charged with first- or second-degree murder (and first- or second-degree murder while armed) charged in the Family Court since January 1, 1999.

With Attempt: There are total of six (6) sixteen- and seventeen-year-olds charged with first- or second-degree murder (and first- or second-degree murder while armed) charged in the Family Court since January 1, 1999.

The data was pulled from CourtView, the Court's Case Management System and the criteria used are as follows:

- Case type = DEL
- File date => 01/01/1999
- Def type = RSPND
- Age at filing was 16 or 17
- Action code was one of the following:

22240101F -----
22240102F |
22240103F |
22240105F |
22240106F |---------- OLD JUVENILE CODES (DEACTIVATED April 2006)
22240107F |
22240301F |
22240302F |
22240303F -----

22DC2101-X -----
22DC2101-Y | ----------COURTVIEW CODES (ACTIVATED April 2006)
22DC2103 -----|

CC Greg Hale
IJIS Project Manager

Wanda Starke
Senior Operations Manager

METROPOLITAN POLICE DEPARTMENT OF THE DISTRICT OF COLUMBIA

METROPOLITAN POLICE DEPARTMENT
Number of Adult and Juvenile Arrests (1/1/06-12/16/06)
by Top Arrest Charge, compared to the same period in 200

Top Arrest Charge	Number and Percent	2005			2006			% Change		
		Adult	Juvenile	Total	Adult	Juvenile	Total	Adult	Juvenile	Total
Aggravated Assault	Count	1357	195	1552	1458	206	1664	7.4%	5.6%	7.2%
	% within Arrest Type	87.4%	12.6%	100.0%	87.6%	12.4%	100.0%			
Arson	Count	13	4	17	12	4	16	-7.7%	0.0%	-5.9%
	% within Arrest Type	76.5%	23.5%	100.0%	75.0%	25.0%	100.0%			
Burglary	Count	267	41	308	331	48	379	24.0%	17.1%	23.1%
	% within Arrest Type	86.7%	13.3%	100.0%	87.3%	12.7%	100.0%			
Disorderly Conduct/POCA	Count	6454	66	6520	6376	102	6478	-1.2%	54.5%	-0.6%
	% within Arrest Type	99.0%	1.0%	100.0%	98.4%	1.6%	100.0%			
Forgery/Uttering Check	Count	67	2	69	85	0	85	26.9%	-100.0%	23.2%
	% within Arrest Type	97.1%	2.9%	100.0%	100.0%	0.0%	100.0%			
Fraud	Count	66	0	66	56	0	56	-15.2%	*	-15.2%
	% within Arrest Type	100.0%	0.0%	100.0%	100.0%	0.0%	100.0%			
Gambling	Count	3	1	4	7	1	8	133.3%	0.0%	100.0%
	% within Arrest Type	75.0%	25.0%	100.0%	87.5%	12.5%	100.0%			
Homicide/Manslaughter	Count	88	2	90	95	6	101	8.0%	*	12.2%
	% within Arrest Type	97.8%	2.2%	100.0%	94.1%	5.9%	100.0%			
Larceny/Theft	Count	910	87	997	1042	101	1143	14.5%	16.1%	14.6%
	% within Arrest Type	91.3%	8.7%	100.0%	91.2%	8.8%	100.0%			
Liquor Laws	Count	66	2	68	182	0	182	175.8%	-100.0%	167.6%
	% within Arrest Type	97.1%	2.9%	100.0%	100.0%	0.0%	100.0%			
Narcotic Drug Laws	Count	8163	312	8475	9065	339	9404	11.0%	8.7%	11.0%
	% within Arrest Type	96.3%	3.7%	100.0%	96.4%	3.6%	100.0%			
Offenses Against the Family and Children	Count	29	0	29	18	0	18	-37.9%	*	-37.9%
	% within Arrest Type	100.0%	0.0%	100.0%	100.0%	0.0%	100.0%			
Other Assaults	Count	3810	348	4158	4116	414	4530	8.0%	19.0%	8.9%
	% within Arrest Type	91.6%	8.4%	100.0%	90.9%	9.1%	100.0%			
Other Felonies	Count	1380	285	1665	1399	333	1732	1.4%	16.8%	4.0%
	% within Arrest Type	82.9%	17.1%	100.0%	80.8%	19.2%	100.0%			
Other Misdemeanors	Count	3651	467	4118	4732	604	5336	29.6%	29.3%	29.6%
	% within Arrest Type	88.7%	11.3%	100.0%	88.7%	11.3%	100.0%			
Prostitution & Commercialized Vice	Count	1716	15	1731	1905	9	1914	11.0%	-40.0%	10.6%
	% within Arrest Type	99.1%	0.9%	100.0%	99.5%	0.5%	100.0%			
Rape/Sexual Abuse	Count	11	0	11	15	1	16	36.4%	*	45.5%
	% within Arrest Type	100.0%	0.0%	100.0%	93.8%	6.3%	100.0%			
Release Violations/Fugitive	Count	4890	60	4950	3862	55	3917	-21.0%	-8.3%	-20.9%
	% within Arrest Type	98.8%	1.2%	100.0%	98.6%	1.4%	100.0%			
Robbery: Carjacking	Count	17	0	17	27	0	27	58.8%	*	58.8%
	% within Arrest Type	100.0%	0.0%	100.0%	100.0%	0.0%	100.0%			
Robbery: Other	Count	404	194	598	422	244	666	4.5%	25.8%	11.4%
	% within Arrest Type	67.6%	32.4%	100.0%	63.4%	36.6%	100.0%			
Sex Offenses	Count	192	15	207	191	11	202	-0.5%	-26.7%	-2.4%
	% within Arrest Type	92.8%	7.2%	100.0%	94.6%	5.4%	100.0%			
Stolen Property	Count	397	15	412	316	18	334	-20.4%	20.0%	-18.9%
	% within Arrest Type	96.4%	3.6%	100.0%	94.6%	5.4%	100.0%			
Theft from Auto	Count	73	0	73	68	0	68	-6.8%	*	-6.8%
	% within Arrest Type	100.0%	0.0%	100.0%	100.0%	0.0%	100.0%			
Traffic Violations	Count	10069	10	10079	10605	18	10623	5.3%	80.0%	5.4%
	% within Arrest Type	99.9%	0.1%	100.0%	99.8%	0.2%	100.0%			
UUV	Count	744	472	1216	789	452	1241	6.0%	-4.2%	2.1%
	% within Arrest Type	61.2%	38.8%	100.0%	63.6%	36.4%	100.0%			
Vandalism/Tampering w/Auto	Count	429	59	488	439	68	507	2.3%	15.3%	3.9%
	% within Arrest Type	87.9%	12.1%	100.0%	86.6%	13.4%	100.0%			
Vending Violations	Count	526	1	527	343	0	343	-34.8%	-100.0%	-34.9%
	% within Arrest Type	99.8%	0.2%	100.0%	100.0%	0.0%	100.0%			
Weapons	Count	1140	146	1286	1382	161	1543	21.2%	10.3%	20.0%
	% within Arrest Type	88.6%	11.4%	100.0%	89.6%	10.4%	100.0%			
TOTAL	**Count**	**46,932**	**2,799**	**49,731**	**49,338**	**3,195**	**52,533**	5.1%	**14.1%**	**5.6%**
	% within Arrest Type	**94.4%**	**5.6%**	**100.0%**	**93.9%**	**6.1%**	**100.0%**			

Source for non-homicide data: Criminal Justice Information System (CJIS) data as of 12/18/06. Totals are based solely on the top arrest charge. One person may booked on more than one arrest charge.

Source for homicide data: Violent Crimes Branch (VCB) as of 12/18/06.

**Division by zero is not allowed.*

The above non-homicide arrests reflect arrests made by all agencies in the District of Columbia.